TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1921.

No. 392.

THE TERRITORY OF ALASKA AND JUNEAU HARDWARE COMPANY, APPELLANTS,

vs.

JOHN W. TROY, COLLECTOR OF CUSTOMS FOR THE DISTRICT OF ALASKA.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF ALASKA, DIVISION No. 1.

FILED JULY 2, 1921.

(28,347)

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INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., AUGUST 6, 1921.

a In the District Court for the Territory of Alaska, Division Number One, at Juneau.

No. 2077-A.

THE TERRITORY OF ALASKA and JUNEAU HARDWARE COMPANY, a Corporation, Plaintiffs in Error,

vs.

JOHN W. TROY, Collector of Customs for the District of Alaska, Defendant in Error.

Names and Addresses of Attorneys of Record.

John Rustgard, Attorney General for the Territory of Alaska, Juneau, Alaska, for Plaintiffs in Error.

United States Attorney, James A. Smiser, and Assistant United States Attorney, Walter Schaffner, Juneau, Alaska, for Defendant in Error.

1 In the District Court for the Territory of Alaska, Division Number One, at Juneau.

No. 2077-A.

THE TERRITORY OF ALASKA and JUNEAU HARDWARE COMPANY, a Corporation, Plaintiffs,

vs.

JOHN W. TROY, Collector of Customs for the District of Alaska, Defendant.

Amended Complaint.

Plaintiffs herein complain of the defendant, and for their cause of action allege:

I.

That the above named plaintiff, Juneau Hardware Company, is and during all the time herein mentioned has been a corporation, duly incorporated, existing and doing business as such under and by virtue of the laws of the Territory of Alaska, and has paid the license fee required by the laws of the Territory for the year 1921.

II.

That the said Juneau Hardware Company has for several years last past conducted an extensive business as a hardware merchant at the City of Juneau, in the Territory of Alaska, is conducting such

business at such place at the present time, and intends to continue to conduct said business at such place in the future; that all, or nearly all, of the merchandise handled by the said plaintiff in such business is and will be purchased by it in various parts of the United States outside the Territory of Alaska, and all, or nearly all,
2 of such merchandise has been, is and will be transported into the Territory of Alaska from various parts of the United States outside of said Territory.

III.

That on or about the 31st day of May, 1921, said plaintiff the Juneau Hardware Company purchased at Evart, in the State of Michigan, merchandise consisting of hardware, to wit, four dozen peevy handles and two dozen pike poles, all of the value of more than one hundred dollars ($100); that said merchandise is intended for the merchandise stock in said plaintiff's mercantile establishment at Juneau, Alaska, and to be sold at that place to the public in the Territory of Alaska; that said stock of merchandise was shipped from Evart in the State of Michigan on or about June 1, 1921, and was routed over the Pere Marquette Railway from Evart, Michigan, to Chicago, Illinois, thence over the Sault St. Marie Railway and the Canadian-Pacific Railway through Canada to the port of Vancouver, in British Columbia, and thence not via an American vessel, but via a British vessel, and a vessel not authorized to carry freight or passengers between American ports, belonging to the Canadian-Pacific Railway, a British corporation, to the port of Juneau, in the Territory of Alaska; that said shipment of merchandise is the property of the above named plaintiff, the Juneau Hardware Company, and is now in transit over said route and will be so transported as aforesaid from the American point aforesaid through Canada and over a Canadian railroad to the port of Vancouver, British Columbia; thence on a British vessel, not authorized to carry freight or passengers between American ports, to the
3 port of Juneau, in the Territory of Alaska, in violation of the provisions of Section 27 of the Act of Congress, approved June 5, 1920, entitled "An Act to provide for the promotion and maintenance of the American Merchant Marine, to repeal certain emergency legislation and provide for the disposition, regulation and use of property acquired thereunder, and for other purposes", but that said merchandise above described is otherwise shipped, transported, carried and manifested, pursuant to the laws, rules and regulations of the United States in such cases made and provided; that plaintiff, the Juneau Hardware Company, will in the future continue in the same manner to ship to the Territory of Alaska large quantities of merchandise, amounting in value to many thousands of dollars, from points in the United States outside of Alaska, and to ship the same over Canadian railroad lines to the ports of Prince Rupert or Vancouver; thence via some foreign vessel not authorized to carry freight between American ports, all in violation of said regulation of commerce contained in said Section 27 of the said Act

of June 5, 1920, but otherwise in conformity with the laws, rules and regulations of the United States in such cases made and provided.

IV.

That defendant is the United States Collector of Customs for the District and Territory of Alaska; that he has been instructed by the Secretary of the Commerce of the United States to carry out the provisions of said Section 27, and to that end to confiscate all merchandise shipped or transported into the Territory of Alaska in violation of the provisions of said Section 27, and he now threatens, and it is his intent and purpose, to confiscate the said shipment of merchandise above described and belonging to said Juneau Hardware Company, and to confiscate all other shipments so made by the Juneau Hardware Company in violation of the said provisions of said Section 27, as soon as such merchandise arrives at the port of Juneau, Alaska, on such British vessel, and to do so upon the ground and on the pretext that such is his duty as the United States Customs Collector of the District of Alaska, and that the provision of said Section 27, which provides, in substance and effect, that merchandise transported by land and water from a point in the United States through British territory to some point in the Territory of Alaska, shall be confiscated unless the same is carried over the water part of the route in a vessel built and documented under the laws of the United States and owned by persons who are citizens of the United States or vessels to which the privilege of engaging in the coastwise trade is extended by Sections 18 or 22 of the aforementioned Act of June 5, 1920, is legal and operative.

V.

That these plaintiffs contend and submit to this Honorable Court that the said Section 27 of the said Act of June 5, 1920, is in conflict with the Constitution of the United States and in particular violates subsection 6 of Section 9 of Article I of the said Constitution in this, that it gives by a regulation of commerce a preference to some ports over other ports of the United States, and discriminates against the ports of Alaska in favor of the other ports of the United States by the said regulation of commerce contained in said Section 27; that by reason of said facts the said section, to the extent that it so discriminates against the ports of Alaska, is void and of no force and effect.

Plaintiffs further contend and respectfully submit to this Honorable Court that plaintiffs, and each of them, and all the people of the Territory of Alaska and all others, have legal right to ship merchandise from any point in the United States outside of Alaska to any port in the Territory of Alaska, and to do so over a Canadian railway line without carrying such merchandise over the water course of such route in an American vessel, or in some vessel to which the privilege of engaging in the coastwise trade is extended by Sections 18 or 22 of the Act of June 5, 1920, above mentioned; that

defendant has no right or authority to confiscate the said merchandise of plaintiff the Juneau Hardware Company aforesaid, and his action in doing so will be unlawful and in violation of the Constitution of the United States, for the reasons above stated, and will cause the said plaintiff the Juneau Hardware Company and the people of the Territory of Alaska irreparable injury, for which plaintiffs have no plain, speedy or adequate remedy at law.

VI.

That plaintiff the Juneau Hardware Company and a large number of other citizens of Alaska desire and intend in the immediate future to import into the Territory of Alaska large quantities of merchandise, amounting in value to many hundreds of thousands of dollars, from various parts of the United States outside of Alaska, and to transport such merchandise over Canadian railway lines to the ports of Vancouver or Prince Rupert in British Columbia and thence to
6 the Territory of Alaska by some British vessel of Canadian or British register, not authorized to engage in the coastwise trade; and it is the purpose and intent of defendant and his successors in office to unlawfully confiscate all such merchandise and to do so upon the ground and on the pretext that it is their duty so to do as United States collectors of customs, and that such shipments are made in violation of the provisions of Section 27 above referred to; and they will so confiscate such shipments unless enjoined and restrained by this court from doing so; that it is the desire and intent of a large number of the citizens of Alaska to ship in the immediate future large quantities of merchandise, amounting in value to many hundreds of thousands of dollars, from the Territory of Alaska to various points in the United States outside of Alaska, and to do so via British ships and ships not authorized to engage in the coastwise trade, to the ports of Prince Rupert or Vancouver in British Columbia, and thence over Canadian railway lines to their destination in some of the states of the United States; that defendant's wrongful and unlawful acts in confiscating such merchandise because the same is shipped in violation of said provisions of said Section 27, as well as his threat to do so, will cause plaintiff the Juneau Hardware Company, as well as all the people of the Territory of Alaska, great expense and irreparable loss, as well as constant annoyance, and will necessitate the institution of a multiplicity of suits in the future to protect such shippers and such merchandise, unless defendant be enjoined and restrained as herein prayed for; that the question of the constitutionality of the said provisions of said Section 27 is of great importance to the people of the Territory of Alaska, and affects all the industries of said Territory; that
7 the principle involved in this suit and in the question of the right of defendant to confiscate merchandise shipped to or from Alaska in violation of the provisions of Section 27 of the said Act of June 5, 1920, is of great interest and importance to the Territory of Alaska, its people and its industries, and the Attorney General of the Territory has been duly directed by the Governor, Sec-

retary and Treasurer of the Territory to prosecute this suit, in the name of the Juneau Hardware Company and the Territory of Alaska, or either of them, and to do so at the expense of the Territory of Alaska; that plaintiffs have no plain, speedy or adequate remedy at law.

Wherefore, plaintiffs pray that it may please this Honorable Court to perpetually and forever enjoin and restrain defendant and his deputies, his successors in office and their deputies (1) from confiscating the merchandise belonging to plaintiff the Juneau Hardware Company, above described, upon the ground that the same has been shipped in violation of the regulation of commerce contained in Section 27 of the Act of June 5, 1920, above referred to; (2) from confiscating any merchandise of any kind shipped to the Territory of Alaska by any person or corporation from any point in the United States outside of Alaska over a Canadian railway line and thence by water via a British vessel not authorized to carry freight or passengers between American ports or any vessel that is not of American register, to a port in Alaska, upon the ground that such shipment so made is in violation of the aforementioned regulations of commerce contained in said Section 27; (3) from enforcing in any manner any provision of Section 27 which discrimi-
8 nates against the ports of Alaska and in favor of the ports of the United States outside of Alaska, either against the plaintiff the Juneau Hardware Company or the said merchandise so shipped as aforesaid, or against any other merchandise shipped in violation of the provisions of said Section 27. Plaintiffs further pray that defendant, his deputies and successors in office, pending the determination of this cause, be enjoined and restrained from confiscating the shipment of merchandise above referred to and belonging to the Juneau Hardware Company and which is now in transit, in violation of the said unequal and discriminating provisions of said Section 27, upon the ground that such merchandise has been shipped in violation of said provisions of said Section; and that plaintiffs have such other and further relief as to the court may seem just and proper.

JOHN RUSTGARD,
Attorney General for the Territory of Alaska and Attorney for Plaintiffs.

UNITED STATES OF AMERICA,
Territory of Alaska, ss:

W. G. Johnson, being first duly sworn, deposes and says: That he is a resident of the city of Juneau, Alaska, and Manager and Treasurer of the above named plaintiff the Juneau Hardware Company, a corporation, and authorized to make this verification; that
9 he has heard read the foregoing amended complaint, and that the same is true, except as to the allegations therein set out on information and belief, and as to those allegations, he believes it to be true.

W. G. JOHNSON.

Subscribed and sworn to before me, this 3rd day of June, 1921.

JOHN RUSTGARD,

[SEAL.] *Notary Public in and for the Territory of Alaska.*

My commission expires Oct. 8th, 1922.

Copy received June 6, 1921.

JAMES A. SMISER,

U. S. Atty.

Filed in the District Court, District of Alaska, First Division, Jun. 6, 1921.

J. W. BELL,

Clerk.

By ————,

Deputy.

Filed in District Court June 6, 1921.

10 In the District Court for the District of Alaska, First Division, at Ketchikan.

No. 2077-A.

THE TERRITORY OF ALASKA and JUNEAU HARDWARE COMPANY, a Corporation, Plaintiffs,

vs.

JOHN W. TROY, Collector of Customs for the District of Alaska, Defendant.

Demurrer.

Comes now John W. Troy, Collector of Customs for the District of Alaska, defendant in the above-entitled action and demurs to the amended complaint heretofore filed, upon the following grounds:

I.

That there is defect of parties plaintiff.

II.

That two alleged causes of action have been improperly united in said amended complaint.

III.

That the amended complaint does not state facts sufficient to constitute a cause of action.

Wherefore defendant prays that the same may be dismissed.

Dated at Ketchikan this 7th day of June, 1921.

JAMES A. SMISER,
United States Attorney;
WALTER SCHAFFNER,
Assistant U. S. Attorney,
Attorneys for Defendant.

Filed in the District Court, District of Alaska, First Division, Jun. 9, 1921.

J. W. BELL,
Clerk.
By V. F. PUGH,
Deputy.

Service of the above is acknowledged this 7th day of June, 1921.

JNO. RUSTGARD,
Attorney for Plaintiffs.

Filed in the District Court, District of Alaska, First Division, Jun. 13, 1921. J. W. Bell, Clerk, by L. A. Green, Deputy.

In the District Court for the District of Alaska, Division No. One, at Ketchikan.

No. 2077-A.

THE TERRITORY OF ALASKA and JUNEAU HARDWARE COMPANY, a Corporation, Plaintiff-,

vs.

JOHN W. TROY, Collector of Customs for the District of Alaska, Defendant.

Ruling on Demurrer.

John Rustgard, for plaintiffs.
James A. Smiser and Walter L. Schaffner, for defendant.

Delivered June 13, 1921.

JENNINGS, *Judge:*

This is a suit for an injunction to restrain the Collector of Customs of the port of Juneau from taking proceedings to forfeit certain merchandise alleged to be in transit to Juneau in a ship of foreign registry and ownership, and consigned to the Juneau Hardware Company. It is alleged that the Collector threatens to take steps to have said shipment forfeited on account of the fact that said shipment is being made in violation of Section 27 of the Act of Congress of June 5, 1920, entitled "An Act To provide for the promotion and maintenance of the American merchant marine, to repeal certain emer-

gency legislation and provide for the disposition, regulation and use of property acquired thereunder, and for other purposes (page 988, Statutes 1919-1920, 2nd Session, 66th Congress), which said section provides as follows:

"That no merchandise shall be transported by water, or by land and water, on penalty of forfeiture thereof, between points in the United States, including Districts, Territories, and possessions
12 thereof embraced within the coastwise laws, either directly or via a foreign port, or for any part of the transportation, in any other vessel than a vessel built in and documented under the laws of the United States and owned by persons who are citizens of the United States, or vessels to which the privilege of engaging in the coastwise trade is extended by sections 18 or 22 of this Act: Provided, that this section shall not apply to merchandise transported between points within the continental United States, excluding Alaska, over through routes heretofore or hereafter recognized by the Interstate Commerce Commission for which routes rate tariffs have been or shall hereafter be filed with said commission when such routes are in part over Canadian rail lines and their own or other connecting water facilities."

To the amended complaint in the case a demurrer has been interposed on the ground that the said amended complaint does not state facts sufficient to constitute a cause of action. In support of the demurrer it is argued (1), that there is no allegation in the amended complaint that the route over which the shipment in question is proposed to be sent is a route for which the Interstate Commerce Commission has prescribed rate tariffs, and hence does not come within the proviso of the Act; (2), that even if it were true that the said route was one for which the Interstate Commerce Commission has prescribed a rate tariff, still the amended complaint states no facts showing that the Act in question is unconstitutional.

I think both points are well taken. As to the first one, it may be observed that if the particular shipment in question is not coming over a route for which the Interstate Commerce Commission has prescribed tariff rates, then the matter does not come within the proviso of the statute and the said shipment and Alaska are not discriminated against in any way whatsoever.

As to the second point, to wit, the question of the constitutionality of the above entitled Act, commonly known as the "Jones Shipping Bill," the contentions of the respective parties are as follows: Plaintiffs contend that section 27 of said Act "violates the demand for equality placed upon the Congressional enactments by sub-section 6 of Section 9 of Article I of the Constitution, which provides:

13 'No preference shall be given by any regulation of commerce or revenue to the ports of one state over those of another; nor shall vessels bound to, or from, one state, be obliged to enter, clear, or pay duties in another.'"

And they rely largely upon the opinion of the majority of the Court in the case of Downs v. Bidwell, reported in 182 U. S., page 244,

where the Court had under consideration the question as to whether or not the Foraker Act in imposing duties upon merchandise shipped from Porto Rico was constitutional. It was urged that although the Court in that case declared that Congress had the right to levy duties upon goods shipped from Porto Rico, yet it had that right because Porto Rico had not been "incorporated" in the United States, and remarks of the Court are cited which, it is alleged, show that if Porto Rico had been incorporated in the United States, the Foraker Act would have been in violation of that provision of the Constitution which prescribes that all "duties, imposts and excises shall be uniform throughout the United States." The argument proceeds that as Alaska has been incorporated in the United States, the Constitution applies here in full force, and so the Jones Act, by discriminating against the ports of Alaska, is obnoxious to that prohibition against the preferring of the ports of one state to another.

On the other hand defendant contends that Alaska not being a state of the Union, the clause alleged to have been contravened is inapplicable.

The argument advanced by plaintiffs would be conclusive if the language of the two sections of the Constitution were the same, but they are not the same. The section as to the uniformity of duties, imposts and excises, prescribes that such duties, etc., shall be "uniform throughout the United States;" whereas the section prohibiting preferences between the ports of the states refers only "to the ports of one state over those of another."

14 When Alaska became incorporated in the United States it became a part thereof, it is true, but nevertheless it sustained a different relation to the whole United States from that which the states themselves occupied. In speaking of the power to lay and collect duties, imposts nd excises, Chief Justice Marshall said, in the case of Loughborough v. Blake, 5 Wheaton, 317:

"The power to lay and collect duties, imposts, and excises may be exercised, and must be exercised, throughout the United States. Does this term designate the whole, or any particular portion of the American empire? Certainly this question can admit but of one answer. It is the name given to our great republic, which is composed of States and territories. The District of Columbia, or the territory west of the Missouri, is not less within the United States than Maryland and Pennsylvania; and it is not less necessary, on the principles of our Constitution, that uniformity in the imposition of imposts, duties and excises, should be observed in the one, than in the other."

To say that a certain thing must prevail throughout the United States would, of course, include Alaska, because Alaska is a part of the United States; but the Constitution was adopted as a compact between independent states, thirteen of them originally. The principles of government enunciated in that Constitution were new in the domain of political science. No such scheme of government had ever existed before. It was not without many misgivings as to the

power conferred upon the Federal Government that the original thirteen colonies ratified that instrument. The individual colonies were proud of their respective sovereignties and fearful lest the Federal Government might absorb more of that sovereignty than they were willing to part with. They therefore hedged about their grant of power in every particular in which they thought limitations should be imposed. They were fearful that discriminations might be made in favor of larger or more prosperous states as against the smaller or less prosperous states; and they therefore insisted that in all the provisions as to the regulation of interstate commerce the states should be treated equally. The provision of the Constitution which it is alleged section 27 of the Jones Shipping Bill con-
15 travenes was not a prohibition relating to the territory of the United States—it had to do only with the states of the Union.

"The Constitution was created by the people of the United States as a union of States, to be governed solely by representatives of the States; and even the provision relied upon here, that all duties, imposts, and excises shall be uniform 'throughout the United States', is explained by subsequent provisions of the Constitution, that 'no tax or duty shall be laid on articles exported from any State,' and 'no preference shall be given by any regulation of commerce or revenue to the ports of one State over those of another; nor shall vessels bound to or from one State be obliged to enter, clear or pay duties in another.' In short, the Constitution deals with States, their people, and their representatives."

Downs v. Bidwell, supra, page 251.

In dealing with foreign sovereignties, however, the term United States "has a broader meaning than when used in the Constitution, and includes all territories subject to the jurisdiction of the Federal government, wherever located. In its treaties and conventions with foreign nations this government is a unit. This is not so because the territories comprised a part of the government established by the people of the States in their Constitution, but because the Federal government is the only authorized organ of the territories, as well as of the States, in their foreign relations." (Ibid, page 263.)

But it is contended that because Chief Justice White has given a historical review of proceedings in the Convention which resulted in the adoption of different clauses relating to interstate commerce and their arrangement, and there comes to the conclusion that "although the provisions as to preference between ports and that regarding the uniformity of duties, imposts and excises were one in purpose and one in adoption, and were originally placed together and became separate only in arranging the Constitution for the purpose of style", therefore the two expressions are identical in meaning. Even if the contention be sound, yet the Supreme Court in Downs v. Bidwell, supra, expresses itself thus:

16 "Construed together, the purpose is irresistible that the words 'throughout the United States' are indistinguishable

from the words 'among or between the several States,' and that these prohibitions were intended to apply only to commerce between ports of the several states as they then existed or should thereafter be admitted to the Union."

Again: Alaska has indeed been incorporated in, and is a part of, the United States, and the Constitution is in full force here, but that fact does not change Alaska from being a territory into a State, nor render applicable to Alaska those provisions of the Constitution which have to do only with the States, albeit the provision "throughout the United States" means throughout every part and parcel "of the great American empire." Besides, the very Constitution which is in force provides that Congress has power "to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States." (Constitution, Article 4, Section 3, Clause 2.) Can it be doubted that under the power thus conferred, Congress has the power, if it chooses to exercise it, to absolutely close, not only the port *or* Juneau but, all the ports of Alaska? Could it not, if it so chose, prohibit all commercial intercourse with Alaska? Having been given the power "to dispose of" the territory, could it not dispose of any part, or the whole thereof? He who denies the existence of this power would have a hard time explaining what is meant by the words "shall have power to dispose of". If Congress has the power to dispose of Alaska, or the power to prohibit commercial intercourse with Alaska, can it be argued that it has not the power to prescribe that such commercial intercourse as is to be had with Alaska shall be had by means of vessels of American ownership and registry?

I very much regret that the time occupied daily in the trial of cases precludes any more exhaustive opinion on my part than is here contained. However, the fact that the opinion is in favor of the constitutionality of the Act does not call for any extended exposition of my view on the subject.

The demurrer will be sustained.

17 In the District Court for the District of Alaska, Division Number One, at Ketchikan.

No. 2077-A.

THE TERRITORY OF ALASKA and JUNEAU HARDWARE COMPANY, a Corporation, Plaintiffs,

vs.

JOHN W. TROY, Collector of Customs for the District of Alaska, Defendant.

Order.

The above entitled action having heretofore on the 10th day of June come on duly and regularly for hearing upon the demurrer *for*

the defendant, John W. Troy, Collector of Customs for the District of Alaska, to the amended complaint of the plaintiffs herein and having been argued by counsel for the respective parties and having on said date been taken under advisement by the Court, and the Court having now considered the same and being fully advised in the premises, and having made and filed his written Opinion,

It is ordered that the demurrer of the defendant, John W. Troy, Collector of Customs for the District of Alaska, to the amended complaint of the plaintiffs herein be and the same hereby is sustained.

And thereupon counsel for plaintiff having in open court declined to plead further and waive his rights so to do,

It is ordered, adjudged, and decreed that the above entitled action be and the same hereby is dismissed; and that the defendant do have and recover of the plaintiffs and each of them his costs herein to be taxed.

Entered in open court this 14th day of June, 1921.

ROBERT W. JENNINGS,
District Judge.

Filed in the District Court, District of Alaska, First Division, Jun. 14, 1921.

J. W. BELL,
Clerk.
By V. F. PUGH,
Deputy.

Entered Court Journal No. D, Page 71.

18 In the District Court for the Territory of Alaska, Division Number One, at Juneau.

No. 2077-A.

THE TERRITORY OF ALASKA and JUNEAU HARDWARE COMPANY, a Corporation, Plaintiffs,

vs.

JOHN W. TROY, Collector of Customs for the District of Alaska, Defendant.

Petition for Appeal.

To the Honorable Robert W. Jennings, Judge of said court:

And now comes The Territory of Alaska and Juneau Hardware Company, a corporation, plaintiffs above named, by their attorney, John Rustgard, and feeling themselves aggrieved by the final decree of this Court filed on the fourteenth day of June, A. D. 1921, dismissing the above entitled cause, hereby pray that an appeal may be allowed to them from the said decree to the Supreme Court of the United States, and, in connection with this petition, petitioners herewith present an assignment of errors.

Petitioners further pray that an order fixing the amount of the bond of appeal be entered.

JOHN RUSTGARD,
Attorney for Plaintiffs.

The foregoing appeal is allowed and the bond on appeal fixed at the sum of $250.00.

Dated June 14, 1921.

ROBERT W. JENNINGS,
District Judge.

Copy received this 14th day of June, 1921.
JAS. A. SMISER,
WALTER SCHAFFNER,
Atty- for Deft.

Filed in the District Court, District of Alaska, First Division, Jun. 14, 1921.
J. W. BELL,
Clerk.

In the District Court for the Territory of Alaska, Division Number One, at Juneau.

No. 2077-A.

THE TERRITORY OF ALASKA and JUNEAU HARDWARE COMPANY, a Corporation, Appellants,

vs.

JOHN W. TROY, Collector of Customs for the District of Alaska, Appellee.

Assignment of Errors.

Now come the appellants, The Territory of Alaska and Juneau Hardware Company, a corporation, by their attorney, John Rustgard, and in connection with their petition for appeal, say that, in the record, proceedings and in the final order or decree aforesaid, manifest error has intervened to the prejudice of the appellants, to-wit:

I.

The Court erred in holding that Section 27 of the Act of Congress, June 15, 1920, entitled "An Act to provide for the promotion and maintenance of the American Merchant Marine, to repeal certain emergency legislation and provide for the disposition, regulation and use of property acquired thereunder, and for other purposes," did not conflict with the Constitution of the United States or any part thereof.

II.

The Court erred in holding that it is within the power of Congress to discriminate by way of rules of commerce against the ports of Alaska.

III.

The Court erred in holding that subsection 6 of Section 9 of Article I of the Constitution of the United States did not apply to Alaska.

IV.

The Court erred in holding that the amended complaint did not state facts sufficient to constitute cause of action.

V.

The Court erred in holding and ruling that the amended complaint was defective and insufficient in this that it failed to allege that the route over which the shipment in question as described in the amended complaint is proposed to be sent is a route for which the Interstate Commerce Commission has prescribed rate tariffs.

VI.

The Court erred in holding and ruling that it was necessary for plaintiffs to allege in their complaint that the route over which the shipment in question is proposed to be sent is a route for which the Interstate Commerce Commission has prescribed rate tariffs.

20 VII.

The Court erred in sustaining the demurrer to plaintiffs' amended complaint.

VIII.

The Court erred in entering judgment dismissing this cause and refusing to enter a decree for plaintiffs as prayed for.

Wherefore, appellants pray that the decree of this Court made and entered on the 14th day of June, 1921, dismissing said cause, may be reversed and the plaintiffs have their relief prayed for in their complaint.

JOHN RUSTGARD,
Attorney for Appellants.

Copy received this 14th day of June, 1921.
J. A. SMISER,
WALTER SCHAFFNER,
Atty- for Deft.

Filed in the District Court, District of Alaska, First Division. Jun. 14, 1921.
J. W. BELL,
Clerk.

21 In the District Court for the Territory of Alaska, Division Number One, at Juneau.

No. 2077-A.

THE TERRITORY OF ALASKA and JUNEAU HARDWARE COMPANY, a Corporation, Appellants,

vs.

JOHN W. TROY, Collector of Customs for the District of Alaska, Appellee.

Bond on Appeal.

Know all men by these presents, That we, The Territory of Alaska, and Juneau Hardware Company, a corporation, as principals, and J. R. Heckman, as surety, are held and firmly bound unto John W. Troy, the appellee above named, in the full and just sum of $250.00 to be paid to the said John W. Troy, his attorn*ies*, executors, administrators or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs and successors, jointly and severally, by these presents. Sealed with our hands and seals and dated this fourteenth day of June in the year of our Lord one thousand nine hundred and twenty-one.

Whereas, lately at a term of the District Court in the United States, for the Territory of Alaska, in a suit pending in said Court between the Territory of Alaska and Juneau Hardware Company, a corporation, as plaintiffs and John W. Troy, as defendant, a judgment was entered against the said plaintiffs dismissing their cause of action and the said plaintiffs having obtained an appeal to the Supreme Court of the United States at Washington, to reverse the judgment in the foresaid suit,

Now, the conditions of the above obligation is such, That if the said Territory of Alaska and Juneau Hardware Company, a corporation, shall prosecute their appeal to effect and will pay the amount of said judgment and answer all damages and costs if they fail to make their appeal good, then the above obligation is to be void; else to remain in full force and virtue.

THE TERRITORY OF ALASKA AND
JUNEAU HARDWARE COMPANY,
A CORPORATION,

By Their Attorney, JOHN RUSTGARD,
Principals.
J. R. HECKMAN,
Surety.

Filed in the District Court, District of Alaska, First Division, Jun. 14, 1921.

J. W. BELL,
Clerk.

UNITED STATES OF AMERICA,
Territory of Alaska, ss:

J. R. Heckman, first being duly sworn, deposes and says: That he is a citizen and merchant of Ketchikan, Alaska, that he is
22 worth the sum of $500.00 over and above his debts and liabilities and property exempt from execution; that he is not an attorney, marshal, clerk of any court or other officer of any court.

J. R. HECKMAN.

Subscribed and sworn to before me this 11th day of June, 1921.
[SEAL.]
H. M. STACKPOLE,
Notary Public for Alaska.

My commission expires Febr. 19, 1925.

The foregoing bond is hereby approved.
ROBERT W. JENNINGS,
District Judge.

Copy received this 11th day of June, 1921.
J. A. SMISER,
WALTER SCHAFFNER,
Attys. for Deft.

Filed in the District Court, District of Alaska, First Division, Jun 11, 1921.
J. W. BELL,
Clerk.

23 In the District Court for the Territory of Alaska, Division Number One, at Juneau.

No. 2077-A.

THE TERRITORY OF ALASKA and JUNEAU HARDWARE COMPANY, a Corporation, Appellants,

vs.

JOHN W. TROY, Collector of Customs for the District of Alaska, Appellee.

Citation on Appeal.

UNITED STATES OF AMERICA, *ss:*

To John W. Troy, Collector of Customs for the District of Alaska, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, at Washington, within sixty days from the date hereof, pursuant to an appeal filed in the Clerk's Office of the District Court of the Territory of Alaska, Division One

thereof, wherein the Territory of Alaska and Juneau Hardware Company, a corporation, are appellants and you are appellee, to show cause, if any there be, why the judgment rendered against the said appellants as in the said complaint mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Robert W. Jennings, Judge of the District Court for the Territory of Alaska, Division One, this fourteenth day of June, 1921.

ROBERT W. JENNINGS,
Judge of the United States District Court for the Territory of Alaska, Division Number One.

Service of above citation admitted June 14, 1921.

JAS. A. SMISER,
WALTER SCHAFFNER,
Attys. for Defendant.

Filed in the District Court, District of Alaska, First Division, June 14, 1921.

J. W. BELL,
Clerk.

24 In the District Court for the Territory of Alaska, Division No. One, at Juneau.

THE TERRITORY OF ALASKA and JUNEAU HARDWARE COMPANY, a Corporation, Plaintiffs and Appellants,

vs.

JOHN W. TROY, Defendant and Appellee.

Pracipe.

The Plaintiffs, appellants, indicate the following as the portions of the record to be incorporated in the record on the transcript of appeal:

1. Amended complaint.
2. Demurrer to amended complaint.
3. Opinion of the court sustaining demurrer.
4. Final order and decree.
5. Petition for appeal and order granting same.
6. Assignment of errors.
7. Bond on Appeal.
8. Pracipe.
9. Citation.

JOHN RUSTGARD,
Attorney for Appellants.

Service of above pracipe admitted this 14th day of June, 1921.

JAS. A. SMISER,
WALTER SCHAFFNER,
Attorneys for Appellee.

Filed in the District Court, District of Alaska, First Division, June 14, 1921.

J. W. BELL,
Clerk.
By V. F. PUGH,
Deputy.

25 *Certificate of Clerk U. S. District Court to Transcript of Record.*

UNITED STATES OF AMERICA,
District of Alaska,
Division Number One, ss.

In the District Court for the District of Alaska, Division Number One, at Juneau.

I, J. W. Bell, Clerk of the District Court for the District of Alaska, Division Number One, hereby certify that the foregoing and hereto attached 24 pages of typewritten matter, numbered from 1 to 24, both inclusive, constitute a full, true, and complete copy, and the whole thereof, of the record, as per the praecipe of the plaintiff in error, on file herein and made a part hereof, in the cause wherein The Territory of Alaska and Juneau Hardware Company, a corporation, are Plaintiffs in Error and John W. Troy, Collector of Customs for the District of Alaska is defendant in error, No. 2077-A, as the same appears of record and on file in my office, and that the said record is by virtue of an appeal and citation issued in this cause, and the return thereof, in accordance therewith.

I do further certify that the transcript was prepared by me in my office, and the cost of preparation, examination, and certificate, amounting to Twelve Dollars ($12.00), has been paid to me by counsel for plaintiffs in error.

In witness whereof I have hereunto set my hand and the seal of the above-entitled court this 15th day of June, 1921.

[Seal of the District Court for the District of Alaska, Div. No. 1.]

J. W. BELL,
Clerk.

Endorsed on cover: File No. 28,347. Alaska D. C. U. S., Division No. 1. Term No. 392. The Territory of Alaska and Juneau Hardware Company, appellants, vs. John W. Troy, Collector of Customs for the District of Alaska. Filed July 2d, 1921. File No. 28,347.

No. 692

In the Supreme Court of the United States

OCTOBER TERM, 1901.

THE TERRITORY OF ALASKA AND JUNEAU HARDWARE COMPANY, APPELLANTS,

v.

JOHN W. TROY, COLLECTOR OF CUSTOMS FOR THE DISTRICT OF ALASKA.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF ALASKA, DIVISION NO. 1.

MOTION TO ADVANCE.

In the Supreme Court of the United States.

OCTOBER TERM, 1921.

THE TERRITORY OF ALASKA AND JUNEAU HARDWARE COMPANY, APPELLANTS,
v.
JOHN W. TROY, COLLECTOR OF CUSTOMS for the District of Alaska.
No. 392.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF ALASKA, DIVISION NO. 1.

MOTION TO ADVANCE.

Comes now the Solicitor General, on behalf of the appellee in the above-entitled cause, and respectfully moves the Court to advance said case for argument on Monday, October 31st, or as soon thereafter as may please the Court.

The appellants brought this suit to restrain the defendant from confiscating certain merchandise belonging to the Juneau Hardware Company under section 27 of the Act of Congress, approved June 5, 1920, entitled "An Act to provide for the promotion and maintenance of the American merchant marine, to repeal certain emergency legislation, and provide for the disposition, regulation, and use of property

acquired thereunder, and for other purposes," which merchandise had been shipped from a point in the United States over a Canadian railway line and thence by water via a British vessel not authorized to carry freight or passengers between American ports to a port in Alaska, upon the ground that section 27 of the said act is in conflict with subsection 6 of section 9 of Article I of the Constitution of the United States, alleging that the said section gives by a regulation of commerce a preference to some ports over other ports of the United States and discriminates against ports of Alaska in favor of the other ports of the United States.

The District Court, in sustaining a demurrer to the complaint, held that, while this provision of the Constitution forbids Congress to discriminate against the ports of any *state*, its terms do not relate to the ports of a *territory* and, therefore, the statute was not in conflict with the Constitution.

The case involves and affects a matter of general public interest in that the statute, in providing for the forfeiture of all goods shipped into the Territory of Alaska otherwise than as provided in the Act, affects a large part of the traffic between the States and the Territory of Alaska. It is, therefore, important that an early hearing may be had in this case.

Counsel for the appellants concur in this motion.

JAMES M. BECK,
Solicitor General.

SEPTEMBER, 1921.

(23,347)

In the Supreme Court

Of the United States

OCTOBER TERM, 1921

No. 392.

THE TERRITORY OF ALASKA and JUNEAU HARDWARE CO., a corporation,

Appellants,

—vs—

JOHN TROY, Collector of Customs for the District of Alaska,

Appellee.

Appellants' Brief

JOHN RUSTGARD
ATTORNEY GENERAL OF ALASKA
Attorney for Appellants

JUNEAU CAPITAL PRINT

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In the Supreme Court
Of the United States

THE TERRITORY OF ALASKA and JUNEAU HARDWARE CO., a corporation,

Appellants,

—vs—

JOHN TROY, Collector of Customs for the District of Alaska,

Appellee.

Appellants Brief

CARDINAL QUESTION TO BE DECIDED

Is the equal right of ingress to and egress from the several states of the Union one of the rights guaranteed to citizens of the United States as such by the constitution, irrespective of whether such citizens are residents of a state or of a territory to which the constitution has been extended?

I.

STATEMENT OF THE CASE

This is a suit in equity instituted by appellants as plaintiffs below, to enjoin appellee, the defendant below, and his successors in office as collector of customs for the district of Alaska, from enforcing the provisions of sec-

tion 27 of the Merchant Marine Act, of June 5th, 1920, generally known as the Jones Law, and entitled,

"An act to provide for the promotion and maintenance of the American merchant marine; to repeal certain emergency legislation, and provide for the disposition, regulation, and use of property acquired thereunder, and for other purposes."

Said section 27 reads as follows:

"That no merchandise shall be transported by water, or by land and water, on penalty of forfeiture thereof, between points in the United States, including Districts, Territories, and possessions thereof embraced within the coastwise laws, either directly or via a foreign port, or for any part of the transportation, in any other vessel than a vessel built in and documented under the laws of the United States and owned by persons who are citizens of the United States, or vessels to which the privilege of engaging in the coastwise trade is extended by sections 18 or 22 of this Act: *Provided*, That this section shall not apply to merchandise transported between points within the continental United States, excluding Alaska, over through routes heretofore or hereafter recognized by the Interstate Commerce Commission for which routes rate tariffs have been or shall hereafter be filed with said commission when such routes are in part over Canadian rail lines and their own or other connecting water facilities: *Provided further*, That this section shall not become effective upon the Yukon river until the Alaska Railroad shall be completed and the Shipping Board shall find that proper facilities will be furnished for transportation by persons citizens of the United States for properly handling the traffic."

Appellants contend that this section is in conflict with various provisions of the constitution of the United

States by reason of the fact that it discriminates in favor of the states and against the territories of the United States.

The Pleadings.

It is alleged in the complaint that the appellant, the Juneau Hardware Company, a corporation, is a merchant engaged in business as such at Juneau, Alaska, and intends to continue such business in the future; that all, or nearly all of the merchandise handled by such appellant in such business is and will be purchased by it in various parts of the United States outside the Territory of Alaska, and all or nearly all such merchandise has been, is and will be transported into the Territory from various parts of the United States outside of Alaska; that a shipment of merchandise has been forwarded to the appellant at Juneau from Evart in the State of Michigan; that this shipment has been routed over the Pere Marquette Railway from Evart, Michigan, to Chichago, Ill., thence over the Sault Ste Marie Railway and the Canadian Pacific Railway through Canada to the port of Vancouver in British Columbia, and thence "not via an American vessel, but via a British vessel and a vessel not authorized to carry freight and passengers between American ports, belonging to the Canadian Pacific Railway, a British corporation, to the port of Juneau in the Territory of Alaska"; that this shipment is now in transit over said route and will be so transported as aforesaid from the American point aforesaid through Canada and over a Canadian Railway to the port of Vancouver, British Columbia, thence on a British vessel not authorized to carry freight and passengers between American ports to the port of Juneau in the Territory of Alaska, in violation of the provisions of section 27 of the Act aforementioned. But it is alleged that this merchandise is otherwise shipped, transported, carried and manifested pursuant to the laws, rules and regula-

tions of the United States in such cases made and provided. (Record pg. 2).

It is further alleged that the Juneau Hardware Company will in the future continue in the same manner to ship to the Territory of Alaska large quantities of merchandise amounting in value to many thousands of dollars from points in the United States outside of Alaska, and to ship the same over Canadian Railway lines to the ports of Prince Rupert or Vancouver, thence via some foreign vessel not authorized to carry freight between American ports, all in violation of said regulation of commerce contained in said section 27, but otherwise in conformity with laws, rules and regulations of the United States in such cases made and provided.

It is then alleged that the defendant is the United States collector of customs for the district of Alaska, and that he has been instructed by the Secretary of Commerce of the United States to carry out the provisions of section 27 and to that end to confiscate all merchandise shipped or transported into the Territory of Alaska in violation of the provisions of said section, and that he now threatens, and that it is his intent and purpose, to confiscate the said shipment of merchandise above described and belonging to Juneau Hardware Company, and to confiscate all other shipments so made by the same appellant in violation of said provisions of said section 27, as soon as such merchandise arrives at the port of Juneau, Alaska on such British vessel, and to do so upon the ground and on the pretext that such is his duty as the United States customs collector of the district of Alaska.

It is further alleged that the defendant considers it his duty to confiscate all merchandise transported by land and water from a point in the United States through British territory to some point in the Territory of Alaska unless the same is carried over the water part of the route in a vessel built and documented under the laws of the

United States and authorized to engage in the coastwise trade in conformity with sections 18 and 22 of the Act of June 5th, 1920. (Record pg. 3.)

The constitutional claims of the appellants are then set up and asserted in the complaint (pg. 3) and it is further alleged that a large number of other citizens of Alaska desire and intend in the immediate future to import into the Territory of Alaska large quantities of merchandise amounting in value to many hundreds of thousands of dollars from various parts of the United States outside of Alaska, and to transport such merchandise over Canadian Railway lines to the ports of Vancouver or Prince Rupert in British Columbia and thence to the Territory of Alaska by some British vessel not authorized to engage in the coastwise trade, and that it is the purpose and intent of the defendant and his successor in office to unlawfully confiscate all such merchandise and to do so upon the ground and upon the pretext that it is their duty so to do as United States collector of customs. (pg. 4).

An injunction is prayed for perpetually enjoining and restraining defendant and his deputies, his successors in office and their deputies from confiscating the merchandise of any kind shipped to the Territory of Alaska by any person or corporation in violation of the provisions of section 27. (pg. 5).

The Territory of Alaska was joined as a party plaintiff and this proceeding was instituted in conformity with the rules prescribed by chapter 25 of the laws of Alaska of the year 1921 (Appendix A), and in compliance with Senate concurrent resolution No. 5 (Appendix B).

The Ruling of The Court.

Appellee filed two special and a general demurrer to the complaint. The special demurrers were abandoned, and the general demurrer was sustained and the case dismissed. The appeal is taken from the judgment of dis-

missal. (Pg. 6).

The court below held, in the first place, that the provisions of section 27 were not in conflict with the constitution and that congress had a legal right to discriminate against Alaska or any other territory, and, in the second place, that the complaint should have alleged that the Interstate Commerce Commission had established through routes to Alaska over the Canadian lines in question. (Pg. 7).

The Statutes as They Were.

Before the enactment of the Jones law, transportation between the states and Alaska over Canadian lines was extensive, the latter lines affording the shorter, cheaper and quicker routes.

This transportation has been conducted under section 3006, R. S. which provides:

> "Imported merchandise in bond, or duty paid, and products or manufactures of the United States, may, with the consent of the proper authorities of the British provinces or republic of Mexico, be transported from one port in the United States to another port therein, over the territory of such provinces or republic, by such routes, and under such rules, regulations, and conditions as the Secretary of the Treasury may prescribe; and the merchandise so transported shall, upon arrival in the United States from such provinces or republic, be treated in regard to the liability to or exemption from duty, or tax, as if the transportation had taken place entirely within the limits of the United States."

The rules of the Treasury Department under this section are set out in Articles 702 and 703 of the Customs Regulations issued by the Secretary of the Treasury.

The transportation of merchandise in foreign vessels between American ports is prohibited by Section 4347 R.

S. as superseded by Section 1, Act of February 17th, 1898 (Section 8097 Compiled Statutes) in the following language:

> "No merchandise shall be transported by water under penalty of forfeiture thereof from one port of the United States to another port of the United States, either directly or via a foreign port, or for any part of the voyage, in any other vessel than a vessel of the United States. But this action shall not be construed to prohibit the sailing of any foreign vessel from one to another port of the United States: Provided, That no merchandise other than that imported in such vessel from some foreign port which shall not have been unladen shall be carried from one port or place in the United States to another."

But this has been construed not to apply to American merchandise first shipped to a foreign port and then shipped to an American port in foreign bottoms.

U. S. vs. Two Hundred and Fifty Kegs of Nails, 61 Fed. 410.

The legislative intent on the subject of evasion of the foregoing section is expressed by Section 3110 R. S. (Section 5822 Compiled Statutes) in the following language:

> "If any merchandise shall, at any port in the United States on the northern, northeastern, or northwestern frontiers thereof, be laden upon any vessel belonging wholly or in part to a subject of a foreign country, and shall be taken thence to a foreign port to be reladen and reshipped to any other port in the United States on such frontiers, either by the same or any other vessel, foreign or American, with intent to evade the provisions relating to the transportation of merchandise from one port of the United States to another port of the United States, in a vessel belonging wholly or in part to a subject of any foreign power, the merchandise shall, on its arrival at such last-

named port, be seized and forfeited to the United States, and the vessel shall pay a tonnage-duty of fifty cents per ton on her admeasurement."

Pursuant to these legislative and judicial expressions the Executive Department has recognized the right of shippers to transport merchandise over Canadian Railroads via foreign ships between American ports, and millions of tons have thus been anually transported during a period covering many decades.

The New Enactment.

Now comes the Jones law and declares that people in the territories shall no longer be permitted to avail themselves of foreign ships on these trans-Canadian routes, but that the people in the states may continue to do so.

A concrete illustration of the application of the law will make this feature here complained of clear:

Merchandise shipped from a point in eastern United States over a Canadian Railway to Vancouver may be carried in a British vessel from Vancouver to Seattle, but that same vessel may not carry the merchandise to any port in Alaska or Hawaii. And, vice versa: merchandise may be shipped from Seattle in a British vessel to Vancouver and thence over Canadian Railway line to Chicago, but the people of Alaska are prohibited from engaging in such trade under pains of having the shipment confiscated. They are required to use only American vessels. As there are no American lines operating between Alaskan and Canadian ports it has become necessary for Alaskans to do all their shipping over the port of Seattle,—which, of course, was the vicious purpose of the discrimination complained of.

Appellants Contentions.

The appellants contend that the law in question is dis-

criminatory and as such void because:

1. Its benefits apply only to the continental United States and only to that part of the continental United States which lies between Canada and Mexico.
2. It denies to United States citizens in the various territories the same commercial rights accorded to United States citizens in the "states."
3. The burden of building up the American merchant marine is placed primarily upon the shoulders of the territories and not equally upon the shoulders of the people in the rest of the country.

II.

SYNOPSIS OF ARGUMENT

1. The treaty ceding Alaska to the United States guarantees to the inhabitants of that Territory, "the enjoyment of all the rights, advantages and immunities of citizens of the United States," and that they "shall be maintained and protected in the free enjoyment of their liberty, property and religion."

   Equal rights to trade and commerce and the equal right of access to the ports and markets of the various states are held by this court to be property rights of citizens of the United States as such, and are guaranteed to the people of Alaska by the treaty with Russia.

   Section 2 of Article IV. of the constitution provides that,

   > "The citizens of each state shall be entitled to all the privileges and immunities of citizens of the several states."

   The treaty with Russia makes this section ap-

plicable to Alaska.

2. Independent of the treaty congress has expressly extended the constitution to Alaska, first by section 1891 R. S., and later by section 3 of the Act of August 24, 1912, entitled,—

> "An Act to create a legislative assembly in the Territory of Alaska, to confer legislative power thereon, and for other purposes,"

and this court has declared in several decisions that Alaska has been incorporated into the United States and forms an integral part thereof.

For this reason Clause 6, Section 9, Article I. of the Constitution applies to and protects the ports of Alaska to the same extent it protects the ports of a state. This clause provides,

> "No preference shall be given by any regulation of commerce or revenue to the ports of one state over those of another, nor shall vessels bound to or from one state be obliged to enter, clear, or pay duties in another."

Under this clause of the Constitution the people of an "incorporated" territory have the same rights of ingress to and egress from the various parts of the United States as have citizens of a state.

It is conceded that the foregoing prohibition against discrimination by "regulation of revenue" aplies to and protects an incorporated territory. This protection would be futile unless it was accompanied by an inhibition against discrimination by "regulation of commerce," and for that reason the two are joined in the same clause.

The history of the enactment of this clause of the Constitution demonstrates it was intended to apply to the entire "American Empire."

In the Insular Cases this court held that the

clause in question would have operated to protect Porto Rico had that territory been incorporated into the United States, the same as is Alaska, or had Congress expressly extended the Constitution to that island.

3. The word "state" as employed in the Constitution is frequently interpreted by this court to include a territory. For instance, in the third clause of Section 8 (the Interstate Commerce clause) where authority is given "to regulate commerce with foreign nations and among the several states and with Indian tribes," this court has held it applies to commerce between a state and a territory.

Similar results have been obtained from construction of fifth Clause, Section 9, Article I; first Clause, Section 10; second Clause, Section 10; first Clause, Section 2, Article IV., and the fourteenth amendment to the constitution.

4. In dealing with an incorporated territory congress may act in two separate capacities. It may act as a federal legislature, and it may act as a local legislature for the internal affairs of the territory.

Acting as a federal legislature it is bound by the general limitations of the constitution.

Acting as a local territorial legislature it has such powers as are possessed by a state legislature, but no more.

The law here in question was enacted by congress in its federal capacity and under the Interstate Commerce clause of the constitution. Laws enacted under that power must be uniform and deal equally with all.

Whether acting as a federal or a territorial legislature congress has no power to deny the people of any territory to which the constitution has been

extended, the same rights of commerce accorded to the people of other parts of the country.

Clause 2 of Section 3, Article IV. which provides,

> "Congress shall have power to dispose of and make all needful rules and regulations respecting the Territory or other property belonging to the United States; and nothing in this constitution shall be so construed as to prejudice any claims of the United States or of any particular state,"

was not intended to in any manner deny to the people of "The Territory" the rights of American citizens, but was intended to give congress power to deal with internal affairs of the embryo states until they were able to assume the duties of their own sovereignty.

This section of the constitution must be read in conjunction with the ordinance of 1787 which remained in full force and effect after the constitution was adopted, and has been construed as applicable to all the territories incorporated into the Union after the adoption of the constitution.

5. It is not necessary to allege in the complaint that the rate tariffs had been filed with the Interstate Commerce Com. or that the latter has established through rates from Evart, Michigan to Juneau, Alaska, over the Canadian lines and via British vessels, for the reason that no valid law requires such proceeding. The Jones law requires that to be done only between ports of continental United States located between Canada and Mexico. The requirement of action by the Interstate Commerce Commission or the filing of tariffs does not extend by that section either to Alaska or Hawaii.

The entire section 27 is void because it discrimi-

nates in favor of that part of the United States which is on the continent and situated between Canada and Mexico. The Executive Departments cannot render it valid by extending the law to the territories which it expressly excludes.

Nor can the courts render the law constitutional by giving it an interpretation which congress expressly provides that it should not have.

No part of section 27 being valid, the law on the subject of transportation between the ports of Alaska and the other parts of the country remains the same as it was prior to the adoption of the void enactment.

III.

ARGUMENT

A.

THE TREATY WITH RUSSIA

The treaty with Russia provides in Article III. thereof, as follows:

"The inhabitants of the ceded territory, according to their choice, reserving their natural allegiance, may return to Russia within three years, but if they should prefer to remain in the ceded territory, they, with the exception of uncivilized native tribes, *shall be admitted to the enjoyment of all the rights, advantages and immunities of citizens of the United States, and shall be maintained and protected in the free enjoyment of their liberty, property and religion.* The uncivilized tribes will be subject to such laws and regulations as the United States, may from time to time, adopt in regard to aboriginal tribes of that country."

What are the rights, advantages and immunities of citizens of the United States, which this treaty guarantees? What are the rights of free enjoyment of libery and property which are to be protected? Briefly, equality before the law; equal opportunities, equal advantages, equal protection.

> "Civil liberty, the great end of all human society and government, is that state in which each individual has the power to pursue his own happiness according to his own views of his interests and the dictates of his conscience unrestrained, except by *equal*, just and *impartial* laws."
>
> Sharswood's Blackstone, 127, Note 8.

If the language of the treaty means anything, it means that the people of Alaska shall be entitled to the same rights, the same advantages, and the same immunities as the people in the several states, including *equal* rights to trade and commerce.

The new Merchant Marine Act in substance beclares that Alaska and Hawaii shall not have the same access to trade and commerce with the states which is enjoyed by the citizens in other places. They are denied equal privileges and advantages of commerce with, and equal ingress to and egress from, the various states, that are enjoyed by and guaranteed t the citizens of the United States in the other parts of the Country.

The lower court was logical in arguing that if Congress had power to close the ports of Alaska, though the ports of the rest of the Country be kept open, it has power to prescribe special conditions under which the ports of Alaska may be entered.

The reverse is equally true: If Congress have power to discriminate against Alaska by "regulations of commerce" it has power to close the ports of that territory entirely.

The question as to whether the equal right to trade

is an American right is, therefore, clearly presented.

The first occurrence of the words "privileges and immunity" in our constitutional history, is to be found in the fourth article of the old Confederation. It declares:

> "That the better to secure and perpetuate mutual friendship and intercourse among the people of the different states in this Union, the free inhabitants of each of these states, paupers, vagabonds and fugitives from justice excepted, shall be entitled to all the privileges and immunities of free citizens in the several states and the people of each state *shall have free ingress and egress to and from any other state* and shall enjoy therein all the privileges of *trade* and *commerce* subject to the same duties, imposts and restrictions as the inhabitants respectively."

In the Constitution of the United States, which superseded the Articles of Confederation, the corresponding provision is found in Section 2 of the fourth Article in the following words:

> "The citizens of each state shall be entited to all the privileges and immunities of citizens of the several states."

Mr. Justice Miller in commenting upon these provisions in the Articles of Confederation and the Constitution asserts in the Slaughter House cases, 83 U. S., 36:

> "There can be but little question that the purpose of both these provisions is the same and that the privileges and immunities intended are the same in each. In the Articles of Confederation we have some of these specifically mentioned and enough, perhaps, to give some general idea of the class of civil rights meant by the phrase." (83 U. S., 75).

It will be observed, therefore, that this court has held that the rights of American citizenship includes equal rights and privileges of trade and commerce, equal right of ingress and egress to and from the several states.

In enumerating the rights of an American citizen as such, and as distinct from his rights as a citizen of a state, Mr. Justice Miller, quoting from Crandall vs. Nevada, 73 U. S. 745, says:

"He has the right of free access to its seaports through which all operations of foreign commerce are conducted." (83 U. S. 79).

And, continuing, this great Jurist adds,

"The right to use the navigable waters of the United States, however they may penetrate the territory of several states, and all rights secured to our citizens by treaties with foreign nations, are dependent upon citizenship of the United States and not citizenship of a state."

This is the right which was guaranteed to the people of Alaska by the treaty.

It is little comfort to the people of that territory to be accorded a right of trial by jury, or any other privilege accorded by the "bill of rights," if they are denied equal access to the markets of the other states or of the world for the products of their labor.

"So fundamental has this privilege of every citizen to be free from disparaging and unequal enactments, in the pursuit of the ordinary avocations of life, been regarded," says Mr. Justice Field in the Slaughter House cases, "that few instances have arisen where the principle has been so far violated as to call for the interposition of the courts." (83 U. S. 106).

And he continues:

"This equality of right with exemption from all *disparaging* and *partial* enactments in the lawful pursuits of life *throughout the whole country*, is the distinguishing privilege of citizens of the United States. To them everywhere, all pursuits, all professions, all avocations are open without other restric-

tions than such as are imposed *equally* upon all of the same age, sex and conditions." (Italics ours) (83 U. S. 109).

In the same case Mr. Justice Bradley says:

"If a man be denied full equality before the law, he is denied one of the essential rights of citizenship as a citizen of the United States." (83 U. S. 113).

Discussing the same subject in the same case, Mr. Justice Swayne says:

"Life, liberty and property are forbidden to be taken 'without due processes of law' and 'equal protection of the law' is guaranteed to all. Life is the gift of God and the right to preserve it is the most sacred of the rights of man. Liberty is freedom from all restraints but such as are justly imposed by law. Beyond that limit lies the domain of usurpation and tyranny. property is everything which has an exchangeable value and *the right of property includes the power to dispose of it according to the will of the owner.* Labor is property and as such merits protection. The right to make it available is next in importance to the right of life and liberty. It lies to a large extent at the foundation of most other forms of property and of all solid individual and material prosperity * * * * * * * 'Equal protection of the laws' places all upon a footing of legal equality and gives the same protection to all for the preservation of life, liberty and property and the pursuit of happiness." (Italics ours) (83 U. S. 127).

The equal right to contract is a property right belonging to a citizen of the United States as such.

Lachner vs. U. S., 198 U. S. 52.

"Equal protection of the laws," says Mr. Justice Field in the Railroad Tax Cases, "not only implies the right of each to resort, on the same terms with others, to the courts of the Country for security of

his person and property, the prevention and redress of wrongs and the enforcement of contracts, but also his exemption from any greater burden or charges than such as are equally imposed upon all others under like circumstances. Unequal exactions in every form, or under any pretense, are absolutely forbidden."

The Railroad Tax Cases, 13 Fed. 722 (733).

Congress now says that the people of Alaska may not ship the products of their labor to the State of Illinois in the same manner or by the same means employed by the people of Oregon, or Washington or New York.

When the people of the Territory of Alaska were admitted to the rights, privileges and immunities of American citizens, and when it was guaranteed to them that they should be maintained and protected in the free enjoyment of their property, it comprehended, not only the equal right to life and liberty, but the equal right to trade and commerce, the equal right of ingress and egress to and from the several states,—these being indispensable property rights. Nothing less is meant by the right to "equal protection of the laws."

When the lower court insists that congress of the United States has a right to close the ports of Alaska or sell the Territory into foreign bondage, it is evident that the treaty with Russia, as well as the constitution, was overlooked.

In the name of the treaty and the constitution combined, the people of Alaska ask for equal rights with the people of the rest of the United States, to trade and commerce, and ask this as an indispensable ingredient of equal right to property and to the pursuit of happiness.

B.

INTERPRETATION OF CLAUSE 6 OF SECTION 9, ARTICLE I.

It is well settled by this court that the term "United States" as used in the Constitution applies to "The American Empire" and includes not only the various states but also the incorporated territories; hence, it is that the "uniformity clause" of Section 8, Article I., which provides that "All duties, imposts or excises shall be uniform throughout the United States," deprives Congress of power to discriminate for or against any incorporated territory.

Loughboraugh vs. Blake, 5 Wheat. 317.

In that case Chief Justice Marshall said:

> "The power, then, to lay and collect duties, imposts and excises may be exercised and must be exercised throughout the United States. Does this term designate the whole or any particular portion of the American Empire? Certainly this question can admit of but one answer. It is the name given to a great republic which is composed of states and territories. The District of Columbia, or the territories west of the Missouri, is not less within the United States than Maryland or Pennsylvania, and it is not less necessary on the principle of our Constitution that uniformity in the imposition of imposts, duties and excises should be observed in one than in the other."

This court has held in Rasmussen vs. United States, 197 U. S. 518, that Alaska has been incorporated into the United States and is an integral part thereof.

That case involved the question of whether or not the Constitution applied to Alaska.

Mr. Justice White, writing the opinion for the court, said:

> "It follows, then, from the text of the treaty by

which Alaska was acquired, from the action of Congress thereunder, and the reiterated decisions of this court, that the proposition that Alaska is not incorporated into and a part of the United States is devoid of merit, and therefore the doctrine settled as to unincorporated territory is inapposite and lends no support to the contention that Congress in legislating for Alaska had authority to violate the express command of the sixth amendment."

This court had previously in the case of Binns vs. United States, 194 U. S. 486, held that Congress might, in its capacity as a local territorial legislature acting for Alaska, levy a license tax for the sole benefit of the territory on business conducted within the territory. But also held that it could not do so in its capacity as a federal legislature.

In the Rasmussen case the court referred to its former decision in the Binns case in the folowing language:

"The court declared it to be settled that Alaska had been undoubtedly incorporated into the United States, and, hence, conceded that the license complained of was invalid if levied by Congress under the general grant in the Constitution of the power of taxation." (197 U. S. 524-5).

The question now before the court is whether clause 6 of Section 9, Article 1., is operative in Alaska. It reads as follows:

"No preference shall be given by any regulation of commerce or revenue to the ports of one state over those of another; nor shall vessels bound to or from one state be obliged to enter, clear or pay duties in another."

The first sentence prohibits preference by way of regulation (1) of commerce, or (2) of revenue. It is argued that this applies only to ports of the political units known as "states" and does not extend to the territories.

It must be admitted, however, that to construe this to mean that there may be discrimination by "regulation of *revenue*" between the ports of a state and those of a territory, will be in conflict with the uniformity clause of section 8 which deprives Congress of power to levy any "duty, impost or excise" other than "uniform throughout the United States."

And to hold that this sentence was intended to authorize Congress to discriminate against the citizens of the United States residing in a territory, and to do so by means of regulation of commerce, is to hold that this sentence is in conflict with the other provisions of the Constitution which insures to all citizens of the United States *equal* protection of the law.

If we admit that the prohibition against preference by "regulation of revenue" applies to a territory, but deny that the prohibition against preference by "regulation of commerce" applies also thereto, we split the sentence in the middle and divide that which was designedly united. We make ourselves guilty of even a worse offense than that; we give the word "state" when applied to one part of the sentence one meaning, and when applied to another part of the same sentence quite another meaning. This is not only grammatically obnoxious, but historically unjustified, for the Fathers were men who thought and wrote in straight lines.

Obviously, regulation of commerce and regulation of revenue were necessarily placed in the same category and on the same footing, because to grant equality in one without insuring equality in the other, would be useless.

Exactly the same situation arises in the second sentence of this clause. It is provided that, "nor shall any vessel bound to or from one state be obliged to enter, clear *or pay duties* in another."

It is conceded that the inhibition against requiring a vessel to "pay duties in another" applies to a territory,

but it is asserted that the inhibition against requiring it to "enter" or "clear" in another applies only to "states."

Either all or nothing of this provision must apply to territories. If it be construed to apply only to states, it is in conflict with the uniformity rule. To accept the other horn of the dilemma and apply one half of the sentence to a territory, and the other half to a state, should not be considered permissible unless the result is clearly in accord with the other clauses in the Constitution, as well as in accord with the spirit of the times in which the Constitution was written.

That the provisions of the sixth clause of section 9 was intended to apply to the entire Country, is demonstrated by the history of its origin and its adoption.

On the 28th day of August, 1787, the committee to whom these propositions were referred, reported as follows:

> "That there be inserted after the fourth clause of the seventh section, 'nor shall any regulation of commerce or revenue give preference to the ports of one state over those of another or oblige vessels bound to or from any state to enter, clear or pay duties in another and all tonnage, duties, imposts and excises laid by the legislature shall be uniform thruout the United States.' "

Reviewing the history of the last sentence of Clause 1 of Section 8 and Clause 6 of Section 9, Mr. Justice White, in Knowlton vs. Moore, 179 U. S. 107, after showing how these provisions originally appeared conjointly, relates:

> "On September 14, 1787, the words 'but all such duties, imposts and excises shall be uniform throughout the United States' which in their adoption had been associated with and formed but a part of the clause forbidding a preference in favor of the port of one state over the port of another state,— in other words, had been a part of another clause—were shif-

ted by unanimous vote from that paragraph and were annexed to the provision granting the power to tax.

"Thus it came to pass that although the provisions as to the preference between ports and that regarding uniformity of duties, imposts and excises, were one in purpose and one in their adoption, they became separated only in arranging the constitution for the purpose of style. The first now stands in the Constitution as a part of the sixth Clause of Section 9 of Article I. and the other as a part of the first Clause of Section 8 of Article I."

This common purpose of the two clauses of the Constitution referred to and emphasized by Mr. Justice White, is of importance in this discussion, for the reason that this court has already decided in the Binns case that Clause 1 of Section 8 applies to Alaska. It seems so clear that when these two provisions were incorporated into the Constitution the framers had a single mind to uniformity throughout the United States and equal treatment of all the citizens of the "American Empire."

The principles involved in this case were discussed at length, and, as we believe, settled, in Downs vs. Bidwell, 182 U. S. 244. That case involved the constitutional status of the people of Porto Rico under the treaty with Spain. The Foraker Act imposed a duty on merchandise imported into the United States from Porto Rico, and the question was whether or not the Constitution applied to that island.

The question before the court for decision was stated in the following language by Mr. Justice Brown:

"If Porto Rico be a part of the United States, the Foraker Act imposing duties upon its products is unconstitutional, not only by reason of violation of the uniformity clause, *but because by Section 9, vessels bound to or from one state cannot be obliged to en-*

ter, clear or pay duty in another." (182 U. S. 249).

No exception was taken to this statement of the case by any of the other justices. It was, in substance, repeated both by Mr. Justice White and by Mr. Chief Justice Fuller, and it was conceded by all that if the Constitution applied to Porto Rico, Clauce 6 of Section 9 was operative in that island the same as in a state.

Mr. Justice White stated, inter alia, the question before the court in the Downes case as follows:

> "It is contended that the duty collected was also repugnant to the export and preference clause of the Constitution. But as the case concerns no duty on goods going from the United States to Porto Rico, this proposition must depend also on the hypothesis that the provision of the Constitution referred to apply to Porto Rico because that island has been incorporated into the United States. It is hence manifest that the latter contention is involved in the previous one, and need not be separately considered."
>
> (182 U. S. 288).

Later on, in referring to this clause, he says:

> "But the power just referred to, as well as the qualification of uniformity, restrains Congress from imposing an impost duty on goods coming into the United States from a territory which has been incorporated into and forms a part of the United States. This results because the clause of the Constitution in question does not confer upon Congress power to impose such an impost duty on goods coming from one part of the United States to another part thereof."
>
> (182 U. S. 292).

In passing it will be observed that this eminent jurist has here construed the term "state" of the United States to mean "part" of the United States.

It will also be observed that no contention was made that Porto Rico was a state. The question was whether

or not, though only a territory, it was one of those territories to which the constitution applied. This court held that Porto Rico was not an incorporated territory and that the constitution had never been extended to the island either by the treaty or by any act of Congress. Throughout his opinion, Mr. Justice Brown at times reverted to and emphasized the word "state" as used in the claus in question, as if to indicate that it could not apply to territory. But he was the only one of the justices who seemed attracted to that view, and, moreover, the rest of his opinion indicates very clearly that he would have he that if by affirmative action by Congress the Constitution had been made applicable to Porto Rico, Clause 6 of Section 9 would have been operative to protect the island.

This feature he emphasized both in the Binns case and in the Rasmussen case. In the latter he says:

> "My position regarding the applicability of the Constitution to newly acquired territory, is contained in an opinion delivered by me in Downes vs. Bidwell. It is simply that the Constitution does not apply to territories acquired by treaty until Congress has so declared, and that in the meantime, under its power to regulate a territory, it may deal with them regardless of the Constitution.
>
> * * * * * *
>
> In the general act (R. S. paragraph 1891), Congress did declare that 'the Constitution and all laws of the United States, which are not locally inapplicable, shall have the same force and effect within all organized territories and in every territory hereafter organized, as elsewhere within the United States.' If the Act of May 17, 1884, providing a civil government for Alaska be regarded as *organizing* a territory there, it would follow that such territory at once fell within R. S. section 1891, and the Constitu-

tion was extended to it without further action. The first article declares that Alaska 'shall constitute a civil and judicial district the government of which shall be organized and administered as hereinafter provided.' Had the opinion treated the territory as organized under this act, I should not have dissented from this view, since paragraph 1891 would have applied to it. (197 U. S. 532).

* * * * * *

The true answer to the question whether the Constitution applies to a territory, is to be found in the fact, whether Congress has extended the Constitution to it or not." (197 U. S. 534).

Mr. Chief Justice Fuller, in commenting upon the constitutionality of the Foraker Act in Downes vs. Bidwell, after quoting the sixth clause of Section 9, and referring to that clause, says:

"This Act on its face does not comply with the rule of uniformity, and that fact is admitted."

(182 U .S. 352).

This is simply another way of stating the problem before the court as it was stated by Mr. Justice Brown, and it confirms the assertion that the justices sitting in that case were unanimously of the opinion that this clause must be interpreted in the spirit of the uniformity rule in order to harmonize with the rest of the constitution, and that if the constitution had applied to Porto Rico, clause 6 of Secion 9 would also have applied.

Commenting further on the same subject, Mr. Chief Justice Fuller said:

"The power of Congress to act directly on the rights and interests of the people of the states can only exist by, and as granted by, the Constitution And by the Constitution Congress is vested with power 'to regulate commerce with foreign nations

and among the several states and with Indian tribes.' *The territories are, indeed, not mentioned by name, and yet commerce between the territories and foreign nations is covered by the clause, which would seem to have been intended to embrace the entire internal as well as foreign commerce of the Country.*"

(Italics ours) (182 U. S. 354-5).

It is of importance to observe that in this statement Mr. Chief Justice Fuller construes the word "state," as used in the Interstate Commerce clause of the Constitution, not to exclude the territories.

We quote the language of Chief Justice Taney in the Passenger Cases, 7 How. 492, as repeated by Mr. Chief Justice Fuller in Downes vs. Bidwell:

"Living as we do under a common government charged with the great concerns of the whole Union, every citizen of the United States from the most remote *states or territories* is entitled to free access, not only to the principal departments established at Washington, but also to its judicial tribunals and public offices in every state and territory of the Union. * * * * For all the great purposes of which the federal government was formed we are one people with one common country. We are all citizens of the United States; and, as members of the same community, *must have the right to pass and repass thru every part of it without interruption*, as free as in our states." (Italics ours) (182 U. S. 360).

In Dred Scot vs. Sandford, 19 How. 393, the court was unanimous in holding that the power to legislate respecting a territory was limited by the restrictions of the Constitution.

In the case of United States vs. Morris, Fed. Cas. No. 15,815, Mr. Justice Curtis observed:

"Nothing can be clearer than the intention to have the Constitution, laws and treaties of the United

States in equal force throughout every part of the territory of the United States alike in all places at all times."

In Murphy vs. Ramsey, 114 U. S. 15, Mr. Justice Mathews said:

"Personal and civil rights of the inhabitants of the territories are secured to them as to other citizens by the principle of constitutional liberty which restrain all the agencies of government, state and national. The political rights are franchises which they hold as privileges in the legislative discretion of the Congress of the United States." (114 U. S. 44).

In the Downes case the Attorney General took the position, just as in the case at bar, that Congress had unrestrained power over commerce between the territories and the states, but this court refused to accept that view, as is clearly pointed out by the Chief Justice who says, referring to the Foraker Act:

"If this can be done, it is because the power of Congress over commerce between the states and any of the territories is not restricted by the Constitution. This was the position taken by the Attorney General with a candor and ability that did him great credit.

"But that position is rejected, and the contention seems to be that, if an organized and settled province of another sovereignty is acquired by the United States, Congress has the power to keep it, like a disembodied shade, in an intermediate state of ambiguous existence for an indefinite period."

(182 U. S. 372).

In Dooley vs. U. S., 183 U. S. 151, the same doctrines are repeated by the Chief Justice and never controverted by any of the justices. After quoting clauses 5 and 6 of Section 9, the Chief Justice says:

"These provisions were intended to prevent the application of the power to lay taxes or duties, or the

power to regulate commerce so as to discriminate between one *part* of the country over *another*. The regulation of commerce by majority vote, and the exemption of exports from duties or taxes, were parts of one of the great compromises of the Constitution." (Italics ours) (183 U. S. 168).

And again,

"But if that power of regulation is absolutely unrestricted as respects interstate commerce, then the very unity the Constitution was framed to secure, can be set at naught by a legislative body created by that instrument.

"Such a conclusion is wholly inadmissible. The power to regulate interstate commerce was granted in order that trade between the states might be left free from discriminate legislation, and not to impart the power to create antagonistic commercial relations between them

"*The prohibition of preference of ports was coupled with the prohibition of taxation on articles exported. The citizens of each state were regarded entitled to all privileges and immunities by citizens in the several states, and that included the right of ingress and egress, and the enjoyment of the privileges of trade and commerce.*" (Italics ours) (183 U. S. 171-2).

Referring in the same opinion to the Interstate Commerce clause of the Constitution, the Chief Justice said:

" . . . And this is equally true in respect to commerce with the territories, for the power to regulate commerce includes the power to regulate it, not only as between foreign countries and the territories, but also by necessary implication as between the states and territories.

"Nothing is better settled than that the states cannot interfere with interstate commerce, and it is easy to see that if the exclusive delegation to Congress of

the power to regulate commerce did not embrace *commerce between the states and territories, that interference by the states with such commerce might be justified.*" (Italics ours) (183 U. S. 172-3).

It is difficult to see how this court can hold that the constitution of the United States guarantees to the people of Alaska equality before the law,—equal right to protection of life, liberty and property, and yet be denied equal opportunity to engage in trade and commerce. If Congress has a right to prohibit the people of Alaska from shipping in foreign vessels and yet grant that privilege to people of other parts of the Country, it has the right to deny to the people of Alaska equality before the law. If Congress has the authority to deny the people of Alaska the right to ship in foreign vessels, though such privilege be extended to people in other parts of the Country, Congress would, unquestionably, have the right to deny to the people of Alaska the right to ship in any vessel whatever though such privilege be extended to the people in other parts of the Union. In other words, Congress would have the right to close the ports of Alaska when the ports of the rest of the Country are kept open,—just as asserted by the trial court in this case. If that be conceded the vaunted equality disappears and the treaty is violated.

No such right has ever been claimed or exercised or attempted to be exercised by Congress of the United States over any incorporated territory during the one hundred and thirty two years of its existence under the Constitution, until the sixty-fifth Congress undertook to make the great Territory of Alaska pay tribute to the ports of Puget Sound. And that historical interpretation of the Constitution by Congress itself should have some weight in interpreting the language employed in that document.

The first invasion of the equal right of the territory to trade and commerce occurred when the Act of October 6th, 1917, giving the United States Shipping Board au-

thority to permit foreign vessels to carry freight between American ports during the war, was passed.

That Act (Sec. 7709aa, Compiled Statutes) provides:

> "During the present war with Germany and for a period of one hundred and twenty days thereafter the United States Shipping Board may, if in its judgment the interests of the United States require, suspend the present provisions of law and permit vessels of foreign registry, and foreign-built vessels admitted to American registry under the Act of August eighteenth, nineteen hundred and fourteen, to engage in the coastwise trade of the United States: Provided, That no such vessel shall engage in the coastwise trade except upon a permit issued by the United States Shipping Board, which permit shall limit or define the scope of the trade and the time of such employment: Provided further, That in issuing permits the board shall give preference to vessels of foreign registry owned, leased, or chartered by citizens of the United States or corporations thereof: *And provided further, That the provisions of this Act shall not apply to the coastwise trade with Alaska or between Alaskan ports.*"

At that time, when there was throughout the world a dearth of transportation facilities, when humanity was clamoring for food, fish was rotting on the wharfs of Alaska for lack of ships to carry it to the states. Yet, British vessels, ready and willing to carry our cargoes of food, passed our ports weekly, but were denied the right to assist in relieving the distress, because it might interfere with the only two American steamship lines operating in Alaska,—"two lines with but a single thought, two hearts that beat as one."

That same pirate spirit which during the war expressed itself in the Alaska clause of the foregoing law,

has still sufficient influence at the Capitol to put Section 27 of the Jones Law upon the statutes of the Country.

C.

MEANING OF THE TERRITORIAL CLAUSE IN THE CONSTITUTION

The position of the Government is expressed by the learned Trial Court in the following language:

> "The very constitution which is invoked provides that Congress has power 'to dispose of and make all needful rules and regulations respecting the Territory or other property belonging to the United States.' (Constitution, Article 4, Section 3, Clause 2). Can it be doubted that under the power thus conferred, Congress has the power, if it chooses to exercise it, to absolutely close, not only the Port of Juneau, but all the ports of Alaska? Could it not, if it so chose, prohibit all commercial intercourse with Alaska, having been given the power 'to dispose of' the Territory? Could it not dispose of any part, or the whole, thereof? He who denies the existence of this power, would have a hard time explaining what is meant by the words, 'shall have power to dispose of.' If Congress has the power to dispose of Alaska or the power to prohibit commercial intercourse with Alaska, can it be argued that it has not the power to prescribe that such commercial intercourse as is to be had with Alaska, shall be had by means of vessels of American ownership and register?"
>
> (Pg. 11).

It may with equal logic be added that if the Congress has power to discriminate against the ports of the Territory, it has power to close its ports, and if it has power to close the ports of the Territory it has power to other-

wise dispose of the Territory, for the right to discriminate involves the right to destroy.

If we admit the Court's premises, the conclusion is irresistible. If Congress has "power to dispose of" Alaska, Congress may do as it sees fit with this Territory and its people. It may close every port of the Territory; it may sell the Territory into foreign bondage and permit its people to be ruled by foreign potentates.

The lower court is either all right or it is all wrong. There is no middle ground.

But what did the framers of the Constitution mean by the term, "power to dispose of and make all needful rules and regulations respecting The Territory?"

At the time the Constitution was framed, there was only one territory, and that was the "district" Northwest of the Ohio River. This was the territory referred to.

After the Constitutional Convention had convened on the 25th day of May and while it was deliberating, the Congress, sitting under the provision of the Article of Confederation of 1777, adopted, on July 13, 1787, the ordinance of that date which bound the states and *their people* with the territory and *its people* in a solemn contract, inter alia, as follows:

> "Section 14: It is hereby ordained and declared by the authority aforesaid, that the following articles shall be considered as Articles of Compact between the original states and *the people* and states *in the said territory*, and *forever remain unalterable unless by common consent*, to-wit:"

Then follows six articles forming fundamental rights of the states and their people as well as of the people of the territory.

Article 4 provides, inter alia:

> "The said territory and the states which may be formed therein, *shall forever remain a part of this Confederation of the United States of America*, sub-

ject to the Articles of Confederation, and to such alterations therein as shall be constitutionally made and to all the acts and ordinances of the United States in Congress assembled conformable thereto . . . . . ."

These brief quotations are sufficient to show that at the time the Constitution took its form, there was a settled purpose in the minds of the people of the United States to *not* "dispose of" or abandon the territory. The rest of the ordinance discloses an equally settled determination to protect the territory and its people in the enjoyment of the very same rights which the people of the states claimed for themselves.

This compact was signed, as already remarked, at the time the Constitutional Convention was in session. What excuse is there for the assertion that it was the intention of the Convention to bestow upon Congress the right to violate the ordinance of July 13th?

When in 1787 while the Constitutioin was in making, the various states placed their possessions northwest of the Ohio River under the management of Congress, it was done with the specific reservations and covenants set out in the ordinance of that year, and it was done principally for two purposes; viz: to eliminate dispute over boundaries, and to raise by sale of lands, revenue with which to liquidate the national debt.

That each state exercised extreme caution that the united territory and its people should be forever protected in the equal enjoyment of all the rights enjoyed by its parent states and their people, is amply testified to by the ordinance. Each state in that compact bound itself with every other state, as well as with the people of the Northwest Territory, to protect the latter in the equal enjoyment of all those rights, privileges and immunities which each state claimed for itself, to establish and maintain a government in the territory based upon the American principles and to create out of the territory sovereign states as soon

as the population increased sufficiently to be able to support such government.

Not even the commercial equality of the people of the territory was overlooked.

In Article IV. of the Ordinance of 1787, it is provided,

> "The navigable waters leading into the Mississippi and St. Lawrence and the carrying places between the same, shall be common high-ways and forever free, as well to the inhabitants of said territory as to the citizens of the United States and those of any other state that may be admitted to the Confederaion, without any tax, impost or duty therefor."

This clearly expresses a determination to treat the commerce and the ports of the territory exactly in the manner it has been determined to treat the commerce and the ports of the rest of the United States.

These were the covenants and these were the plans, purposes and ambitions out of which the Constitution of the United States grew, and to vindicate and execute which it was formed.

In the light of that mental condition of the Fathers, the language employed by them must be interpreted for, "The intent of the law-makers is the law." It must be obvious that, as a matter of fact, the Constitutional Convention had no intention of giving to Congress power to do as it pleased with "The Territory" and its people.

Is the lauguage employed by them such as to impel this Court to impute a meaning which extrinsic facts prove to be not intended?

All the proceedings and debates of the Constitutional Convention and all the steps leading up to the final adoption of the Constitution, are so permeated with the idea of uniformity of all regulations and equality of all sections of the Country, that we look in vain for the least expression of any idea that the territory, or any part of

it, might be treated differently, commercially or otherwise, from any other section.

Indeed, it may be said that the Constitutional Convention met for the purpose of devising a system by which every section of the Country might be insured against discrimination of any kind. How to insure that uniformity and equality, and protection against discrimination, was the one subject under discussion. So paramount was this idea of uniformity, that if there had been in mind any intent to discriminate against the territory, some expression of such intent would have occurred plainly somewhere in the records of the proceedings.

The idea of uniformity of taxation and uniformity in commercial rights, were always coupled together in the minds of the members of the convention. One was considered barren without the other, and justly so.

The question now arises as to what these men had in mind when they wrote into the Constitution the second clause of Section 3 of Article IV. upon which the lower court placed so much stress.

The records show that this clause was, as it were, an afterthought.

The temporary government of the territory had been provided for by the ordinance. The future disposition of the territory had been definitely arranged for by the same document. Its status and the status of its people had also been recognized by the part of the Constitution which had been tentatively agreed upon, when on the 18th day of August the subject of the "back lands" was introduced.

The history of this clause is given in the following langauge by William M. Meigs in "The Growth of the Constitution in the Federal Convention of 1787."

> "On August 18 Madison introduced and had referred to the Committee of Detail a series of powers which he proposed to confer on Congress; among them was one 'to dispose of the unappropriated lands

of the United States,' and another 'to institute temporary governments for new states arising therein.' The Committee of Detail reported on these subjects on August 22 through Rutledge, and recommended to insert the following words at the end of the sixteenth clause of the first section of the seventh article, among the powers of Congress:—

> " 'And to provide, as may become necessary from time to time, for the well managing and securing the common property and general interests and welfare of the United States in such manner as shall not interfere with the government of individual states, in matters which respect only their internal policy, or for which their individual authority may be competent.'

"This proposal does not seem to have been taken up at any time by the Convention, but some of it found its way into the Constitution in the following manner, while it was also enlarged to cover other points. On August 30, during the discussion of the provision for the admission of new states (Article IV., Section 3, Clause 1), Carroll moved a proviso thereto to declare that nothing in the Constitution should affect the right of the United States to the back lands. He explained that the popular sentiment in Maryland was very strong on this subject, and intimated that the Constitution would hardly be agreed to in that State otherwise. His motion to refer this proposal to a committee was defeated, but he later moved a proviso as follows:—

> " 'Provided, nevertheless, that nothing in this Constitution shall be construed to affect the claim of the United States to vacant lands ceded to them by the treaty of peace.'

"He explained that, though this might be understood as relating to lands not claimed by any parti-

cular states, he had some such in view. Wilson was against it as unnecessary. Madison thought the claims of the United States might in fact be favored by their courts having jurisdiction, but was inclined to think it best to say nothing upon the subject; in any event, it ought to go further and declare that the claims of particular states also should not be affected. Carroll then withdrew his motion, and offered the following instead:—

> " 'Nothing in this Constitution shall be construed to alter the claims of the United States or of the individual states, to the western territory; but all such claims shall be examined into, and decided upon, by the Supreme Court of the United States.'

"But the following substitute was offered by Governeur Morris and was adopted by the Convention.—

> " 'The legislature shall have power to dispose of, and make all needful rules and regulations respecting the territory or other property belonging to the United States; and nothing in this Constitution contained shall be so construed as to prejudice any claims, either of the United States or of any particular state.'

"Luther Martin moved an amendment, 'but all such claims may be examined into, and decided upon, by the Supreme Court of the United States,' but it was lost.

"The first portion of the motion of Governeur Morris was evidently adapted from the proposals which Madison made on August 18. The matter was later referred to the Committee on Style, and they reported it back in the following form:—

> " 'The Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belong-

ing to the United States; and nothing in this Constitution shall be so construed as to prejudice any claim of the United States, or of any particular state.' "

This shows that it was the disposal of the soil that was in the mind of the convention and little if anything more. This was sufficient, for the rest of it had been settled by the covenants in the ordinance.

The members of the fiirst Congress considered themselves bound by the limitations of the Constitution when dealing with the Northwest Territory.

I Stat. at L. 50 ch. 8.

The courts throughout the Country had uniformly held that the Constitution of the United States did not supersede or in any manner abrogate the ordinance of 1787, but supplemented it, and that the ordinance remained in full force until superseded by state constitutions.

In Spooner vs. McConnell, Fed. Case. No. 13,245, Circuit Justice McLean said:

"It is a well established principle that no political change in a government annuls a compact made with another sovereign power or with individuals. The compact is protected by that sacred regard for plighted faith, which should be cherished alike by individuals and organized communities. A disregard of this great principle would reject all the lights and advantages of civilization, and throw us back on barbarism. This compact was formed between communities and the future inhabitants of a rising territory, and the states which should be formed within it. And all who became inhabitants of the territory made themselves parties to the compact, and the compact so formed could only be rescinded by the common consent of those who were parties to it."

See also,

Cincinnati vs. Louisville & Nashville Ry Co., 223 U. S. 390;

Choisser vs. Hargraves, 2 Ill. (1 Scam.) 317.

It has also been held that the covenants of this ordinance became binding upon new territory acquired by and incorporated into the United States subsequent to the adoption of the Constitution.

In Palmer vs. Cuyahoga County, Fed. Cas. No. 10,688, the court said:

> "In the argument the defendant's counsel insist that the Cuyahoga River being within 'that territory called Western Reserve of Connecticut, and which was excepted by the state of Connecticut, out of the cession made by it to the United States in 1786, is not subject to the ordinance. That neither the right of soil or jurisdiction in the reserve was ever vested in the United States until the deed of cession by Connecticut to the United States which was long after the date of the ordinance.' That this reserve was, to some extent, subject to the legislation of Connecticut for several years after the date of the ordinance, is admitted. But when this territory and the jurisdiction over it were ceded to the United States, it became subject to the ordinance, the same as every other part of the Northwest Territory. Rights acquired under the former laws are governed by those laws. But on its cession to the Union, all the laws of the territory, and especially fundamental laws, became the law of the reserve. By consenting to come under the federal government, they became parties to the articles of compact contained in the ordinance."

It is a matter of history that the covenants of the ordinance of 1787 became so much a part of the American conscience that they were treated as applicable to Ore-

gon and Louisiana as well as to the territory acquired from Mexico.

There were provisions in the ordinance which were regarded merely as temporary. But these do not relate to rights of citizens of the United States. They relate only to political rights, which belong only to citizens of a state, as distinguished from those which belong to a person as a citizen of the United States.

The learned court below argued that "The Constitution was adopted as a compact between independent states, thirteen of them originally." (Pg. 9).

This being apparently an extract from one of Mr. Hayne's speeches, it may be appropriate to answer by quoting the following from the reply by Mr. Webster:

> "The Constitution itself in its very front refutes that. It declares it is ordained and established by the people of the United States. So far from saying that it is established by the government of the several states, it does not even say it is established by the people of the several states. But it pronounces that it was established by the people of the United States in the aggregate."

This court ,through Mr. Justice Story in Martin vs. Hunter, 1 Wheaton 304-331 said:

> "The Constitution of the United States was ordained and established, not by the states in their sovereign capacities, but emphatically, as the preamble of the Constitution declares, by 'the people of the United States.'" (1. Wheat. 323).

Again, in McCulloch vs. Maryland, 4 Wheat. 316, Mr. Chief Justice Marshall said:

> "The government proceeds directly from the people; is 'ordained and established' in the name of the people; and is declared to be ordained 'in order to form a more perfect union, establish justice, insure domestic tranquility, and secure the blessings of li-

berty to themselves and their posterity.' "
(4 Wheat. 402).

The members of Congress as well as the deputies to the Continental Convention represented the Western regions, formerly parts of their respective states, as much as they represented any other part of their state. These men were dealing with "states," but with states which in their minds, in the aggregate, comprised the American Empire which they designated the United States.

In their love of good style the proper committees, in drafting the various clauses, sought to avoid tautology by using the "United States" and "states of the Union" interchangeably.

Character of the Authority of Congress Over Incorporated Territories.

Congress, in dealing with an incorporated territory, has two separate functions: One as a federal legislature and the other as a local legislature for the internal affairs of the territory.

As a federal legislature Congress has only such powers as are placed in its hands by the Constitution, subject to such limitations as the Constitution prescribes.

As a local territorial legislature it has all such powers as are reserved to the states—but no more.

Acting as a federal legislature Congress is bound to protect the rights of an American citizen as a citizen of the United States.

Acting as a territorial legislature, in providing for the local government of the territory, Congress cannot violate the rights which the inhabitants of the territory are guaranteed as American citizens, any more than can a state do so.

The political rights—the right to vote and be voted for—are not rights pertaining to citizenship of the Unit-

ed States. Such rights pertain only to citizenship of a state, and by Congress may be prescribed for a territory.

Pope vs. Williams, 193 U. S. 632;

United States vs. Anthony, 24 Fed. Cas. 14,459;

Stone vs. Smith, 159 Mass. 414.

When the fourteenth amendment provides that "no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States," it is not intended that Congress may do so. Congress was already charged with protecting those rights. This amendment was adopted for the purpose of making it clear that the federal government had power to reach into the states to prevent others from violating those rights which were guaranteed by the Constitution.

In the Binns case this court held that when acting as a federal legislature the Congress was limited by the uniformity clause even in its dealings with a territory. In the Rasmussen case this court held that in acting as a local territorial legislature Congress was bound to respect the guarantees of the sixth amendment.

But are the rights to equality in taxation, and the rights to trial by jury, any more sacred than the other rights secured by the Constitution to a citizen of the United States? The rights to equal protection of all laws is as sacred. The equal right to ingress and egress to and from other states is a sacred.

But even should it be conceded, for the sake of the argument, that Congress in its capacity as a local legislature is unrestrained by constitutional limitations, it cannot be controverted that Congress enacted the shipping law pursuant to its power under the Interstate commerce clause of the Constitution. The law complained of is strictly a federal law enacted by Congress in its federal capacity. Acting in that capacity, Congress could act only as authorized by the Constitution. Its primary duty is to make the laws equal and impartial.

Could Congress by virtue of the powers conferred by the Interstate Commerce clause enact a law that is partial and discriminates between the states or between the citizens of a state?

If not, why not?

Because such legislation is in violation of the constitutional provision which vouchsafes to all "equal protection of the laws," equal "rights, privileges and immunities."

But these are the very rights which have been bestowed upon people of Alaska both by the treaty and by the Constitution. It is, therefore, exactly as wrong for Congress to discriminate against a territory and its people as it is to discriminate against a state and its people. The same constitutional guarantees against discrimination, protect both the territory and the state.

There is another objection to asserting that Congress may, in its capacity of a territorial legislature, enact discriminatory commerce regulations, and this objection is stated clearly by the Chief Justice in the Downes case as follows:

> "It is evident that Congress cannot regulate commerce between the territory and the states and other territories in the exercise of the bare power to govern the particular territory, and as this Act was framed to operate, and does operate on the people of the states, the power to so legislate is apparently rested on the assumption that the right to regulate commerce between the states and territories comes within the commerce clause by necessary implication."
>
> (182 U. S. 354-5).

In the case of Stoutenburgh vs. Hennick, 129 U. S. 141, the Chief Justice said:

> "In the matter of interstate commerce the United States are but one country and are and must be subject to one system of regulation and not to a multi-

tude of systems."

In the Downes case, Mr. Justice White said:

"As Congress in governing the territories is subject to the Constitution, it results that all the limitations of the Constitution which are applicable to Congress in exercising this authority, necessarily limit its powers on this subject."

In the same case and touching the same point, Mr. Chief Justice Fuller quoted the language of Mr. Chief Justice Taney in the Passenger Cases (7 How. 283, 492), and which language is so pertinent here, has already been quoted on page 27 of this brief.

D.

WHERE THE TERM "STATE" INCLUDES "TERRITORY"

The third clause of Section 8 (the Interstate Commerce clause) reads:

(Congress shall have power) "to regulate commerce with foreign nations and among the several states and with Indian tribes."

This power is exclusive. Nothing is here said about the territory. But does it exclude the "states" from regulating commerce between a state and the territories? Does it vest Congress with power to regulate commerce between the territories and the states? If it does, why does it? For the obvious reason that at the time the Constitution was drafted and adopted, the public mind was so permeated with the idea that the territory was on an equal footing with the states, so far as treatment of commerce was concerned, that no other relationship except that of equality was thought of, and for the further reason that any other view would not give the people of the territories the equal protection of the laws guaranteed by other parts of the Constitution.

Louis Simpson, 15 Fed. Cas. No. 8533;
Handley vs. Kansas City So. Ry., 187 U. S. 617;
Beitzell vs. District of Columbia, 21 App. D. C. 49.

In the second Dooley case the Chief Justice said:

"Nothing is better settled than that the states cannot interfere with interstate commerce, and it is easy to see that if the exclusive delegation to Congress of the power to regulate commerce did not embrace commerce between the states and territories, that interference by the states with such commerce might be justified."

The fifth clause of Section 9, Article 1. provides,

"No tax or duty shall be laid on articles exported from any state."

Will it be contended that this means that Congress may lay taxes on articles exported from a territory which has been incorporated into the Union? Such interpretation will certainly violate the guarantees of the Ordinance of 1787, and the uniformity clause of the Constitution, as well as the provisions guaranteeing to all equal protection of the laws. In order to harmonize with the rest of the Constitution, this clause must be interpreted to read:

"No tax or duty shall be laid on articles exported from any *part* of the United States."

The first clause of Section 10 provides:

"No state shall enter into any treaty, alliance, or confederation," etc.

But may a territory do so? May Congress acting as a territorial legislature, do so. Could the Northwest Territory, under the provision of the Ordinance of 1787, do so? Obviously not.

The second clause of Section 10 provides:

"No state shall, without the consent of Congress, lay any imposts or duties on imports or exports," etc.

Is not a territorial legislature, as well as Congress

when acting as a territorial legislature, bound by this clause?

The first clause of Section 2 of Article 4 provides:

> "The citizens of each state shall be entitled to all the privileges and immunities of citizens in the several states."

Were not the citizens of "The Territory" always entitled to the same rights? If they were, by virtue of what provision of the Constitution were they if not by the foregoing?

The fourteenth amendment provides:

> "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States," etc.

But can a territory, or can Congress acting as a territorial legislature, do so? If not, why not?

These are a few illustrations which demonstrate that in the interpretation and application of the Constitution, "The letter killeth but the spirit maketh whole."

E.

ALLEGATION OF ESTABLISHMENT OF THROUGH ROUTE BY INTERSTATE COMMERCE COMMISSION NOT NECESSARY.

The learned court below held that the complaint was defective for failure to aver that a through route over Canadian lines and via British vessels had been established between Alaska and the states.

But Section 27, so far from requiring or even permitting the establishment of such routes, expressly prohibits shipments to Alaska via foreign vessels. It does require the establishment of such through routes when the shipment is made between two points in the continental

United State south of Canada. No authority is given, either to the courts or to any of the departments, to extend that rule or requirement to any other territory.

If the law had provided that when merchandise is shipped from Chicago to Seattle via Canada a red tag must be tied on the packages, would it have been necessary to allege that the red tag was attached to the shipment here in question?

To allege that a through route had been established between Michigan and Alaska via British vessels would be to allege something which the statute in question neither requires nor permits.

The ruling of the lower court is evidently based upon the theory that while the section in question is void because discriminatory in its application, it can be rendered valid by giving it a nondiscriminatory enforcement. Obviously, if a statute is void because it covers only a part of the subject it cannot be rehabilitated by the Executive Department by extending it over the entire subject.

There is no lawful warrant for reading into a statute something which has been expressly excluded.

The law is unconstitutional because it is too narrow. It cannot be rendered constitutional by applying it to subjects or territories it was not designated by the legislature to cover.

In some instances, where the statute is unconstitutional because it is too broad, the obnoxious excess may be lopped off or disregarded.

> "The general rule is that if a proviso operates to limit the scope of the act in such manner that by striking out the proviso the remainder of the statute would have a broader scope either as to subject or territory, then the whole act is invalid, because such extended operation would not be in accordance with the legislative intent."
> 6 R. C. L. 129;

Chicago, M. & St. P. R. Co., vs. Wesley, 178 Fed. 619;
State vs. Cudahy Packing Co., 33 Mont. 179;
State vs. Mitchell, 97 Me. 66;
State vs. Chicago etc. R. Co., 195 Mo. 228;
Kellyville Coal Co. vs. Harrier, 207 Ill. 624;
State vs. Pitts, 160 Ala. 133;
Edmonds vs. Herbrandson, 2 N. D. 270.

The statute here in question is either void in whole or valid in whole. If it be void in whole there is no authority for confiscating the shipment in question. For it is alleged that they are made in every way in conformity with the requirements of the laws of the Country and the rules of the Treasury Department, except the provisions of Section 27.

It must not be overlooked that this section, reduced to direct language, simply says that the people of Alaska are prohibited, under any and all conditions, from employing foreign ships on the trans-Canadian routes although the people of the states are permitted to do so.

Respectfully submitted,

JOHN RUSTGARD,
Attorney General of Alaska,
Attorney for Appellants.

APPENDIX A.

Chapter 25 *of Laws of Alaska for* 1921.

AN ACT

To provide for the institution and maintenance by the Territory, or in its name, of various proceedings before courts of Justice and other tribunals and officers, to protect the rights or promote the interests of the people of the Territory, and declaring an emergency.

Be it enacted by the Legislature of the Territory of Alaska:

Section 1. Whenever the constitutionality or validity of any statute is seriously in doubt, and the enforcement of such statute affects the Territory or a considerable portion of its people or important industries therein, suits or actions may by the Attorney General be instituted in the name of the Territory in any court to determine the constitutionality or validity of such law. And such proceeding may be had for that purpose either by means of suits to restrain, or by means of action to compel, the enforcement of such law, or by any other appropriate proceeding that will bring the question at issue fairly before the court. Or, the Attorney General may for such purpose institute or defend actions or suits for private individuals or corporations, and at the expense of the Territory, whenever the importance of the questions involved to the inhabitants of the Territory shall warrant it; but no such proceeding shall be instituted or maintained in the name of the Territory or at its expense except with the approval of the Governor, Secretary and Treasurer or any two of them in the manner hereinafter provided.

Section 2. It shall also be the duty of the Attorney General to protect the interests of the Territory and its

people before the United States Shipping Board, the Interstate Commerce Commission, or any other Bureau, board, committee, commission or officer of the United States, or of any of the States of the Union, in any action, suit, proceeding or hearing in which the Territory is a necessary or a proper party, or in which the Territory or its people, or a considerable portion thereof, are interested, or its industries are materially affected; and it shall be his duty to institute on behalf of the Territory and in its name any appropriate proceeding before such board, commission, committee, officials or other tribunals to protect the right and promote the interests of the Territory and its people, subject, however, to the provisions of the succeeding sections in this act.

Section 3. That the Governor of the Territory is hereby constituted the Agent of the Territory of Alaska, upon whom service of summons or other process or notice of hearing shall be made in any action, suit, or proceeding which may be instituted or pending in any of the Courts of the United States, or before the United States Shipping Board, the Interstate Commerce Commission or any other Bureau, Board, Committee, Commission or officer of the United States or of any of the States of the Union and in which the Territory is a necessary or proper party or in which the Territory or the people or a considerable part thereof are interested.

Section 4. That when served with summons, process or notice of any hearing or action, suit or proceeding of any nature instituted or pending before the tribunals or officers aforesaid, in which the Territory may be a proper or necessary party, or in which the interests of the Territory or its people may be involved or affected adversely or otherwise, or if it shall come to his attention that the interests of the Territory or its people or a considerable portion thereof are or may be liable to be affected in any suit, action, hearing or proceeding pending before

any of the said tribunals or officers, it shall be the duty of the Governor of the Territory to immediately call into consultation the Secretary, Treasurer and Attorney General of the Territory to determine whether any action should be taken in behalf of the Territory therein, and if it be determined by a majority of them that the interests of the Territory or a considerable portion of its people are liable to be adversely affected or that they may be promoted or protected by an appearance in or at such action, hearing or proceeding, the Governor shall so instruct the Attorney General in writing and direct him to appear and represent the Territory therein.

Section 5. On receiving such instruction from the Governor to so appear in such action, hearing or proceeding, the Attorney General shall, and he is hereby authorized and directed to appear on behalf of the Territory or its people, and use all proper means to protect the interests so entrusted to him as therein directed. And the said Attorney General shall be authorized to employ additional counsel to attend and represent the Territory in said proceeding, but only after receiving the authority to do so from the Governor, Secretary and Treasurer, or any two of them, made after a finding by them that the expense of such additional counsel will be less than expenses likely to be incurred by personal attendance of the Attorney General or where additional counsel because of the importance of the matter involved would in their judgment be for the best interests of the Territory.

Section 6. When in the opinion of the Governor, the Secretary and Treasurer of the Territory, or any two of them it shall be for the best interests of the people of the Territory, or the Territory itself to commence any action, hearing or other proceeding before any Court, tribunal or Board or Commission, or officer mentioned in Sections 1 and 2 of this Act, they shall so direct the Attor-

ney General, under the hand of the Governor, and the Attorney General shall proceed as directed therein, if in his opinion the action or proceeding can be prosecuted with success. If his opinion is adverse to such action he shall set forth the reasons for such opinion and embody same and the correspondence in regard thereto in his biennial report to the Legislature.

Section 7. The Attorney General is authorized and empowered in any hearing or proceeding, in which he has appeared or is about to appear before any Board, Court, Commission, Committee, or officer of the United States involving, or which may involve, traffic and commerce or rates of transportation or carriage between points within the Territory to or from points without the Territory; or between places within the Territory, to demand from any person, firm or corporation, engaged in the transportation business in whole or in part between such points or places, any information which may be pertinent at such hearing or proceeding or which may be necessary to prepare for the defense of the interests of the people of the Territory thereat and may require by notice in writing that such person, firm or corporation, furnish or produce, within a reasonable time, for his inspection, any books or other records, in the possession of such person, firm or corporation, showing the amount of freight and passenger traffic to and from or within Alaska; the rates respectively charged therefor on each class of freight or passenger; the carriage expense; and other expense in aggregate and detail including overhead charges; the bonded and other indebtedness and interest charges; the gross capital invested and how invested; amount charged off for depreciation; the gross and net income and any other data either in detail or the aggregate necessary or pertinent in such hearing or proceeding and in the event such person, firm or corporation neglect, or fail, or refuse to furnish, produce or deliver such data or informa-

tion to or its books or records for inspection by the Attorney General upon his demand in writing, within a reasonable time, specifically detailing the information required, and reason and necessity therefor, for use in such hearing or proceeding the said Attorney General may present to the judge of the District Court of Alaska, his petition in the name of the Territory for the production or furnishing of such data or information or production of books and records for inspection. Such petition shall set forth therein the nature of the hearing or proceeding for which the information is required, the necessity or materiality thereof and such other facts as may be pertinent to place before the Judge the importance of obtaining the same, and thereupon if the court shall be satisfied that the petition is made in good faith to obtain information necessary or important to the Territory or its people at the hearing or proceeding designated and that the same can or ought to be supplied to the Territory, he shall issue an order directing such person, firm or corporation to appear before the Court on a day and hour certain to show cause why an order should not issue directing the furnishing of such data or the producing of such records or books or part thereof as the court shall deem proper. Said order shall be served on such person, firm or corporation in the same manner as other process of the court. At the time set therein, or such other time as the court may in its discretion set, the court shall hear and determine the issues formed by the petition and any answer thereto which may be filed, and shall determine whether the information or data mentioned in the petition is necessary or important in whole or in part to the Territory in the hearing in which it is proposed to be used; whether the same can be obtained and whether such person, firm or corporation should produce the same or any part thereof for the purpose designated and if it be found by the Court that such information or data is important for prepara-

tion for trial to the petitioner, or is necessary or important at such hearing and that the same should be produced or furnished the Attorney General for preparation for or for use, or production at such hearing, he shall enter an order accordingly specifying therein the time within which the same shall be furnished or produced for inspection and whether in whole or in part and what part. If such person, firm or corporation so ordered shall fail, neglect or refuse to produce for inspection or furnish the information to the Atorney General in the manner and within the time limited in such order, the said person, firm, or corporation shall be deemed guilty of contempt and shall be fined in any sum not exceeding five thousand dollars, which fine shall be covered into the general fund of the Territorial treasury.

Section 8. That the necessary expenses of the Attorney General in making investigation for and in appearing in such hearing or proceedings shall be provided for out of the emergency appropriation in such amount or amounts, as from time to time may be necessary, the same to be allowed and audited by the Governor, Secretary and Treasurer or any two of them, who, before allowance, shall certify to the necessity for such expenditure and the reasonableness of the amounts so allowed.

Section 9. An emergency is hereby declared to exist, and this Act shall take effect from and after its passage and approval.

Approved May 3, 1921.

APPENDIX B.

SENATE CONCURRENT RESOLUTION NO. 5.

BE IT RESOLVED by the Senate, the House of Representatives concurring, that

WHEREAS, the provision of Section 27 of the General Shipping Bill of June 5, 1920, excluding Alaska from the enjoyment of the benefits of through routing over Canadian lines, the same as is bestowed upon every other part of American territory, is a vicious discrimination against and a great injustice and injury to our people; and

WHEREAS, we believe that said discrimination is in violation of Section 9, Article 1, of the Constitution of the United States, which provides that "no preference shall be given by any regulation of commerce or revenue to the ports of one state over those of another;"

NOW, THEREFORE, the Attorney-General is hereby instructed to take all proper measures to test and determine the validity of the law in question, to the end that the discrimination against Alaska by the enforcement of the aforementioned provision may be discontinued.

Passed by the Senate, March 29, 1921.

Passed by the House, April 8, 1921.

No. 392.

In the Supreme Court of the United States.

OCTOBER TERM, 1921.

THE TERRITORY OF ALASKA AND JUNEAU HARDWARE CO., A CORPORATION, APPELLANTS,

v.

JOHN TROY, COLLECTOR OF CUSTOMS FOR THE DISTRICT OF ALASKA, APPELLEE.

BRIEF FOR APPELLEE.

WASHINGTON GOVERNMENT PRINTING OFFICE 1921

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JOHN TROY, COLLECTOR OF CUSTOMS FOR the District of Alaska, appellee.

No. 392.

ARGUMENT FOR APPELLEE.

It is a novel and fascinating experience to explore virgin territory in the construction of the Federal Constitution. Nearly all of that great document has been plowed by successive decisions of this court, until most constitutional questions turn not so much upon the meaning of the words of the original document as upon the meaning of the judicial interpretation of those words. This is inevitable, for Chief Justice Marshall pointed out in an early period that the Constitution was little more than a working plan for an edifice that was to endure forever, and that, while it must guide the master builders who in the future would erect the superstructure in conformity with the original plan, it could not express the various means by which a design was to be carried out. To

quote his own language in the great case of *McCulloch* v. *Maryland* (4 Wheat. 316):

> This provision is made in a constitution intended to endure for ages to come, and consequently to be adapted to the various crises of human affairs. To have prescribed the means by which Government should in all future times execute its powers would have been to change entirely the character of the instrument and to give it the properties of a legal code.

Thus, in the evolutionary interpretation of the Constitution, its present-day interpreters quite naturally are more concerned with the superstructure of judicial interpretation than the foundation of the original text, which the superstructure has almost hidden from view.

In this case, however, the court is called upon to interpret a clause of the Constitution which has rarely been interpreted for any purpose, and, so far as the industry of counsel discloses, has never been interpreted in its application to the question now under consideration. That clause is:

> No preference shall be given by any regulation of commerce or revenue to the ports of one State over those of another, nor shall vessels bound to or from one State be obliged to enter, clear, or pay duties in another.

Under this clause, the question in the instant case is whether such a prohibition of preferential terms to any port of a "State" includes the port of a Territory, and, as stated, this precise question has

apparently never been before decided by this court, although in the Insular cases (*Downes* v. *Bidwell*, 182 U. S. 244; *De Lima* v. *Bidwell*, 182 U. S. 1) and in the Alaska License cases (*Binns* v. *United States*, 194 U. S. 486) reference was made to it in the discussion of the question as to how far the provision of the Constitution as to uniformity of taxation applied to Territories, incorporated or unincorporated.

The question in the instant case turns upon the precise meaning to be given to the word "State." Was it merely a description of any geographical part of the United States, or did it refer to the States which either formed the Union or were subsequently admitted into the Union, as distinguished from Territories which had not been admitted to the full privileges of the State?

It can hardly be disputed that the framers of the Constitution clearly distinguished between the "States" and the "United States" and the "Territories." Its whole history shows that its great purpose was to determine to what extent the sovereign States which formed the Confederation would surrender a part of their sovereignty. And, in this wonderful adjustment of the Federal Government, which they were creating, to the States, rights, powers, and obligations were created with reference to the States as against the Federal Government and with reference to the Federal Government as against the States.

Let me first consider each reference in the Constitution to the States, and consider how far, as to each

provision, the word "State" can be regarded as inclusive of the Territories. They are as follows:

Article I, section 2, provides for a House of Representatives to—

> be composed of members chosen every second year by the people of the several *States*, and the electors in each *State* shall have the qualifications requisite for electors of the most numerous branch of the *State* legislature.

The next paragraph provides that no person shall be a Representative unless he shall—

> when elected be an inhabitant of that *State* in which he shall be chosen.

The next clause provides that Representatives and direct taxes shall be apportioned "among the several *States*" which may be included within this Union, and it is provided that "each *State* shall have at least one Representative"; and there follows a specific and temporary provision as to the number of Representatives to be allotted at the beginning to the States, which originally created the United States.

Section 3 provides that the "Senate of the United States shall be composed of two Senators from each *State*."

It is then provided that no person shall be a Senator who is not, when elected—

> an inhabitant of that *State* for which he shall be chosen.

Section 4 provides that the times, places, and manner of holding elections for Senators and Repre-

sentatives shall be prescribed in each *State* by the legislature thereof.

In all these clauses the word "State" is plainly exclusive of a Territory.

Section 8 provides that Congress shall have power to—

> levy taxes; but all duties, imposts, and excises shall be uniform *throughout the United States*.

The court will note the significant change of phraseology. It does not state that the duties, imposts, and excises shall be uniform throughout the several States, but "throughout the United States," and therefore this court held in the Insular cases and the supplemental decisions that this clause, with respect to uniformity of taxation, applied not merely to the States, but to such Territories as had been "incorporated" into the Union. It is therefore clear that the term "the United States," comprises the whole of what Chief Justice Marshall called "the American empire," whether the constituent part be a State or a Territory.

The next is the famous "commerce clause," in which the power is given to Congress to regulate commerce—

> with foreign nations and among the several *States* and with the Indian tribes.

"Among the several States" imported a sphere of power that was in part beyond the State, and the words "and with the Indian tribes", most of which then lived in the Territories, clearly shows that power

was given to the Congress to regulate all commerce, except that which was wholly within a State. Hence, commerce with the Territories is expressly included in this grant of power.

The next paragraph provides for the establishment of a—

> uniform rule of naturalization and uniform laws on the subject of bankruptcy throughout the United States.

Here again, observe that they did not refer to the States as such, but the whole nation, as a whole, is the subject of the power.

The next provision refers to the organization of the militia, and it contains a reservation "to the *States*, respectively," of the appointment of the officers.

Here, the word "State" is less limited than the United States.

The next clause provides for a seat of government which may be acquired "by cession of particular *States*," and the power to purchase within a State lands for public purposes, "by the consent of the legislature of the State."

Here, again, the word "State" is plainly exclusive of the word "Territory;" for the Government, under its broad power to govern the Territories, did not need any such cession.

The next clause prohibits Congress, until the year 1808, from limiting the power "of a State" to regulate the migration or importation of persons into their domain; and this, of course, plainly has no

reference to the Territories, over which the Federal Government had plenary power.

The next clause provides:

> No tax or duty shall be laid on any article exported from any *State*.

Here again, the word "State" clearly refers to the States of the Union and not to the Territories.

Then follows the clause now under consideration, in which the Constitution provides that no preference shall be given "to the ports of one *State* over those of another."

If they had intended this provision to refer to the Territories, would not the clause, having in mind the constant distinction between the United States and the States, have read?

> No preference shall be given by any regulations of commerce or revenue to any port in the United States.

Such, however, is not the language. It is to the ports of "one State over those of another," and this is emphasized by the additional provision that—

> vessels bound to or from one *State* [shall not] be obliged to enter, clear, or pay duties in another.

Section 10 then provides that "no State" shall do various things, such as enter into treaties of alliance, grant letters of marque and reprisal, coin money, emit bills of credit, make legal tender, pass bills of attainder or *ex post facto* laws or law impairing the obligation of contracts, or grant any title of nobility.

Obviously, this clause could have no reference to the Territories; for, as Congress was given by the same Constitution plenary legislative power over the Territories, a prohibition that intended to prohibit Congress from doing the acts enumerated would have been worded very differently.

The next two sections provide that

> no *State* shall, without the consent of Congress, lay any import or duties on imports or exports,

and that—

> no *State* shall, without the consent of Congress, lay any duty of tonnage, keep troops or ships of war in time of peace, enter into any agreement or compact with another State or with a foreign power, or engage in war, unless actually invaded, or in such imminent danger as will not admit of delay.

In all these cases it is quite plain that the inhibition was upon the powers of sovereign States, and that it had no reference to a Territory, over which no such prohibition was necessary, as the Congress had plenary power of legislation with reference to them.

Passing now to Article II of the Constitution: The first section relates to the manner of selecting a President, and provides, in substance, that each "*State*" shall appoint, in such manner as the legislature thereof may direct, a number of electors, equal to the whole number of Senators and Representatives to which the State may be entitled in the Congress.

Here again it is obvious that the word "State" is exclusive of a Territory.

Section 2 provides that the President shall be commander in chief of the Army and "of the militia of the several *States*" when called into actual service of the United States.

Here again there can be no suggestion that "State" means the Territories, for the Federal Government needs no power to organize a militia in a Territory and to call it into service.

Article III relates to the judicial power of the United States, and, *inter alia*, confers judicial power to—

> controversies between two or more *States;*—between a *State* and citizens of another *State;*—between citizens of different *States;*—between citizens of the same *State* claiming lands under grants of different States, and between a *State*, or the citizens thereof, and foreign States, their citizens or subjects.

Here again there is no question that the word "States" refers to the constituent States; for the judicial power over the Territories is conferred by another clause of the Constitution and is plenary.

The next clause provides that the trial of all crimes "shall be held in the *State* where the said crime shall have been committed."

In the case of *Thompson v. Utah* (170 U. S. 343), there are some *obiter dicta* which might seem to indicate that Article III, section 2, with reference to the place of criminal trials, applied as well to the Territories as to the States, but that decision was right-

fully decided upon the sixth amendment to the Constitution, which provided that—

> In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

It was therefore not necessary to decide that Article III, section 2, referred as well to a Territory as to a State, although it might well be the fact, inasmuch as the obvious purpose of that section was not so much to distribute power between States and Nation as to establish an inviolable and personal right to trial by jury. That this distinction between the distribution of governmental power and the adjustment of the machinery of our dual form of government, on the one hand, and the guaranty of *personal* rights, moving to the individual citizen directly, on the other, was the controlling reason for the decision is shown by the quotation in the opinion of the previous opinion of this court in *Mormon Church* v. *United States* (136 U. S. 1). In that case this court, after affirming in the broadest way the plenary power of the Federal Government over the Territories, added:

> Doubtless Congress, in legislating for the Territories, would be subject to those *fundamental* limitations in favor of *personal* rights which are formulated in the Constitution and its amendments; but these limitations would exist rather *by inference* and the general spirit of the Constitution from which Congress derives all its powers than by any express and *direct application* of its provisions.

In other words, this court held—and has always held, before and since—that in the matter of the fundamental personal rights of the individual it did not matter where he was under our flag, and his personal rights were safeguarded by the pertinent provisions of the Constitution and the amendments.

It is quite obvious that the economic question as to how Congress shall regulate foreign and interstate commerce by regulating ports of entry is not, in any true sense, a question of personal right. *It is an economic and political question,* which concerns States and not individuals. So far as the States are concerned Congress may not, under its power to regulate foreign commerce, give preference by direct provision to the ports of one State over thase of another—

> What is forbidden, is not discrimination between individual ports within the same or different States, but discrimination between States. (*Pennsylvania* v. *Wheeling & B. Bridge Co.*, 18 How. 421, 435.)

The remainder of the clause—

> Nor shall vessels bound to or from one State be obliged to enter, clear, or pay duties in another—

shows also that this clause of the Constitution was placed there for the protection of the States. The immunity from discrimination is a reserved right on the part of the constituent States and does not pertain to individual ports, much less to individual persons.

Outside of the States and in the Territories and colonial dependencies of the United States, the question of uniform treatment of ports of entry is one of governmental policy, which violates no right of any individual, but which simply regulates commerce as the political or economic interests of the nation may determine.

In *Callan* v. *Wilson* (127 U. S. 540) it was also held that, having regard to Article III of the Constitution and the sixth amendment to the Constitution, a citizen of the District of Columbia had the same right to a trial by jury as the citizen of a State; but here again this conclusion was reached because, as stated by this Court—

> There is nothing in the history of the Constitution or of the original amendments to justify the assertion that the people of this District may be lawfully deprived of the benefit of any of the Constitutional guaranties of life, liberty, and property—especially of the privilege of trial by jury in criminal cases.

In other words, the decision was based upon the reasoning that, where the Constitution guarantees to individuals and not to political entities, like States, fundamental personal rights, such provisions apply equally to the States and Territories.

Turning now to Article IV, with the exception of one paragraph, which deals specifically with the Territories, it obviously refers only to the States of the Union. Thus, section 1 provides that—

> full faith and credit shall be given in each *State* to the public acts, records, and judicial proceedings of every other *State*.

Section 2 provides that the—

> citizens of one *State* shall be entitled to all the privileges and immunities of the citizens in the several *States*.

It is next provided that fugitives from any State who may "be found in another *State*" shall, on demand of the executive authority of the State from which they have fled, be delivered up to be removed to the State having jurisdiction of the crime. This could only refer to such sovereign political entities as the States were, and not to Territories, which were virtually colonial dependencies.

The next clause provides that fugitive slaves shall be surrendered to the "States" where they are property.

The next section provides that new States may be admitted by the Congress into the Union; but that no new "State"

> shall be formed or erected within the jurisdiction or any other *State*, nor any *State* be formed by the junction or two or more *States* or parts of *States*, without the consent of the legislatures of the *States* concerned, as well as of Congress.

Section 4 provides that the United States shall guarantee to every "State" in this Union a republican form of government, and shall protect them against domestic violence

> on application of the legislature or of the executive.

That all these provisions relate exclusively to the States as the constituent partners in a great compact is clearly shown, when, in that article, the Constitution clearly distinguishes between States and Territories by a sweeping delegation of power to Congress over the "territory" of the United States. It provides:

> The Congress shall have power to dispose of and make all needful rules and regulations respecting the *territory* or other property belonging to the United States, and nothing in this Constitution shall be so construed as to prejudice any claims of the United States, or of any particular *State*.

The court will observe that, in this section, the Territories are treated as "property belonging to the United States," and not as members of the constitutional partnership. There is no suggestion of any limitation of federal power over the "territory" nor of any right by the States to control this or any "property" of the United States. The reservation that "nothing in this Constitution shall be construed so as to prejudice any claims of the United States or of any particular State" referred to the fact that, when the Constitution was adopted, there were many

conflicting claims by the various States to the so-called Northwest Territory, and as the boundaries of the various cessions by the several States to the General Government had not been ascertained, there were conflicts between the United States, to whom vast stretches of unexplored territory had been ceded, and the States which claimed them, respectively. These questions of territorial adjustment were to be left for future adjustment to the extent that they had not already been solved by the cessions to the Federal Government by different States of their conflicting claims.

To the extent, however, that any Territory was clearly recognized as the "territory" of the United States, there was given to Congress plenary power, not merely to govern them, but even "to dispose of them," without reference to the powers of the States. *Thus we see that in the Territorial clause of the Constitution there was a clear distinction made between three entities—(1) "the particular States," (2) "the United States," and (3) "the territory belonging to the United States."*

Reading this clause, which gave exclusive power to the Federal Government to determine not merely the government but the ultimate fate of the Territories, together with all preceding sections, which gave peculiar rights and imposed peculiar obligations upon the various "States," it is quite clear that the framers of the Constitution never intended, in conferring rights and immunities upon the States,

to confer them as a vested constitutional right upon the Territories.

Article V provides for the amendment of the Constitution upon the initiative of "two-thirds of the several *States*," and only to become valid when ratified "by the legislatures of three-fourths of the several *States*."

Here, again, there can be no contention that the word "States" included Territories, and, as the Territories, even when organized, are never consulted with respect to the propriety of an amendment to the Constitution, it clearly shows the plain distinction between them with respect to the constitutional compact.

Article IV provides for the supremacy of the laws of the United States, and contains reference to the fact that the judges "in every *State*" shall be bound by the Constitution, and that the "members of the several *State* legislatures, and all executive and judicial officers," shall take an oath to support the Constitution.

Finally, Article VII makes the ratification of the Constitution to depend upon the favorable action "of the conventions of nine *States*," which obviously excluded the Territories.

I have thus shown that, in construing the Constitution, the term "the State," or "the several States," etc., has a precise and definite signification, and that the word "Territory" has a similarly precise meaning. To accept the contention now urged in the present case in the able brief of the learned attorney

general of Alaska would do violence to this clear distinction which the Constitution itself has made.

In considering the word "State" in the Constitution, there is also a clear and distinct difference between the meaning of the word "State" in the original Constitution, which concerned itself almost wholly with the distribution of governmental powers between the Federal Government and the States, and the amendments to the Constitution, the first ten of which were intended as a bill of rights, to guarantee the liberty of the individual.

I have not reviewed the first ten amendments to the Constitution; but it is quite obvious that, in so far as they sought to safeguard the inviolable rights of the individual, they referred to the citizens of Territories, as well as to those of the States.

Had the Constitution provided that no preference shall be given to any port "throughout the United States," a very different question would have arisen; but it is well known that the purpose of this provision was to allay the alarm of the various States, if the plenary power over foreign commerce was granted to the Federal Government. Many States feared that if Congress had full power to regulate foreign commerce, that it could so use the power as to build up one port in a given State to the prejudice of another port of another State, and, in the absence of such a restriction, this unquestionably could have been the result. The illustrations used in the discussions which preceded the adoption of this clause

show that, if it were not adopted, it would mean that Congress could pass a law requiring all foreign vessels which were bound for Baltimore to put in at Norfolk, and in that way great prejudice could be done to the port of Baltimore. To avoid such discrimination in favor of the ports of one State as against the ports of another State, the power of Congress over foreign commerce was limited by a reservation that no such preference should be given. In other words, the sovereign States, many of which depended for their prosperity upon their ports of entry, as New York upon the port of New York and Maryland upon that of Baltimore, all were desirous of reserving the right on the part of their ports of entry to equality of terms by the Federal Government.

There was an obvious reason why they did not extend this assurance of equal terms to the ports of a Territory. They did not have in mind "ports" of a Territory, *for none such existed.* The word "port," as used by them, meant a port of entry. Thus, the Standard Dictionary defines the word "port" in this sense, as:

> Any place, whether on the coast or inland, designated as a point at which persons or merchandise may enter or pass out of a country, under the supervision of the customs and other proper authorities.

The territory of the United States, which the framers of the Constitution had in mind, was the vast unexplored territory northwest of the Ohio River to the Great Lakes, most of it a wilderness and land-

locked, and in which the only communities of white men were Indian trading posts or military forts. The "territory" contained no "port" in the sense of the word in which the framers used the term. This becomes the more obvious if it recalled that the original conception of the commerce clause of the Constitution related only to commerce by vessels, whether trans-Atlantic or coastwise. It is quite clear that internal land transportation was not at first regarded as a part of the commercial power of the Union.

In 1802 the Supreme Court of Connecticut sustained a suit brought against the owner of a stagecoach engaged in transportation between Westfield, in Massachusetts, and Albany, in New York, for carrying passengers within the State of Connecticut in violation of a law of that State, which granted an exclusive right to the plaintiff to engage in such transportation. (*Perrin* v. *Sikes*, 1 Day (Conn.), 19.)

In Maryland and Virginia also the right to carry passengers had been granted as a monopoly, and it appears that these laws were construed as applying to travel between States. (McMaster's History of the American People, vol. 2, p. 60; *Conf. Conway* v. *Taylor's Executor*, 1 Black, 603.) Furthermore, as showing the view in this matter in Congress, it is said that a motion was made in the Second Congress to permit stagecoaches carrying the mails from State to State to transport passengers also, but that the motion was lost as being in violation of the rights

of the States. (McMaster's History of the American People, vol. 2, p. 60.)

The "territory" of the United States was in the heart of the American Continent, and had little access to the sea, or the great navigable rivers. Commerce, as the Fathers conceived it, did not exist in the "territory" in the sense of the transportation of merchandise. A few hardy pioneers pushed their way over the Alleghenies into the vast stretches of the Northwest Territory, and the only commerce they knew was bartering guns and powder, and beads, for the furs and game of the savage Indian tribes. The territory, therefore, which the Fathers had in mind, contained no port of entry, in any appropriate sense of the word, which could be made the subject of discriminatory treatment, and this historical fact strengthens the conclusion that the immunity from such preferential treatment had reference to the ports of entry of the various States into which the vessels of commerce came from other States and countries.

Moreover, the clear discinction of governmental power between States and Territories must constantly be borne in mind. As to the States, there was only a limited delegation of power, subject to many reservations and qualifications. As to the Territory there was a plenary power to deal with it as the property of the United States, to the extent even of "disposing" of it at the pleasure of the Federal Government.

It is true that, in the history of this clause, the clause forbidding preference was originally linked

with the clause which required uniformity of taxation "*throughout the United States,*" and it is now suggested that that fact should lead to the conclusion that the construction which is put upon the uniformity of taxation clause and which is expressly applicable throughout the whole of the United States, including its incorporated Territories, should be the same as the clause forbidding preferential treatment of ports.

This argument, however, cuts both ways. May it not be that when that master of clear arrangement and precise style, Gouverneur Morris, who was the "committee on style," separated these two clauses, he thus recognized the clear distinction between them? Certainly it is significant that in the uniformity of taxation clause, the phrase is "throughout the United States;" whereas, in the equality of port privileges clause, the phrase is "the ports of one *State* over those of another." When, therefore, different phraseology was used in these two clauses, and they were broken up into separate paragraphs, the more probable inference would be that there was a distinction between them and the distinction which I have suggested seems to me the most obvious, especially when regard is had to the territorial clause of the Constitution, which vests in the United States plenary power over the Territories.

No one disputes that if this Territory were not incorporated into the Union that the equality clause with respect to ports would not apply. Hence the appellant concedes, under the authority of the Insular

cases, that the Federal Government has power to discriminate between the ports of the States and the ports of unincorporated Territories. It is therefore not accurate to say that the prohibition against discrimination applies to the whole geographical domain of the United States, which Chief Justice Marshall called "the American empire."

Whatever may be the truth as to other clauses of the Constitution which affect the fundamental rights of individuals, there is nothing in the Constitution which suggests that it intended to make any discrimination between the ports of incorporated Territory and unincorporated Territory. What the Constitution did intend to do was to reserve to the constituent States of the Union an immunity with respect to their ports of entry from discriminatory treatment.

Before leaving the question of textual construction, care must be taken to distinguish between the language of the Constitution and the statutes which Congress, from time to time, enacts pursuant to the powers of the Federal Government. Unquestionably Congress, when in the exercise of its powers it broadly legislates for many purposes, often uses the word "State" as inclusive of Territories. Whether the former expression is inclusive of the latter in a statute must be determined with reference to each statute.

In the Constitution, however, a different rule of construction must be followed; for it is obvious that

the Constitution was not an exercise of Federal power, but was primarily a distribution of rights, powers, and obligations between the States that formed the Union and the new Government which was thus created.

I have thus far discussed the question as a matter of textual construction, and it remains to consider the argument, from the history of the Constitution, and especially the reasons which, under present conditions, should favor the construction of the clause as hereinbefore set forth.

When the Constitution was framed it is probable that its framers, even though they were of English birth and inheriting the traditions of the British Empire, did not contemplate that America would ever be a colonizing power. The ambition of the new Government for territorial domain did not stretch beyond the east bank of the Mississippi, and there probably would have been no "territory" of the United States, as distinguished from the aggregate of the constituent States, had it not been for the conflicting claims with reference to the territorial boundaries of the States after the treaty of peace.

The genius of the Anglo-Saxon race has, however, made the United States a great colonizing power. Rapidly it pushed its territorial conquests westward and southward, until the domain of the United States stretched from the Atlantic to the Pacific and from the Great Lakes to the Gulf. Until recent times that domain was continental and contiguous in its character. Subsequently, a noncontiguous Territory was

acquired, when Alaska was purchased from Russia, and for a long time it was regarded as little more than a great stretch of Arctic wildness, which was governed by little more than a military post.

Subsequently, in the year 1898, at the outbreak of the Spanish-American War, Hawaii was annexed, and, after the successful termination of that war, the United States found it necessary to annex Porto Rico and the Philippine Islands, the latter in the Orient and many thousands of miles distant from the nearest port of entry of the United States. Then arose the great question of the nature and extent of the colonial power of the United States, and, as a result of the Insular decisions and the supplementary cases affecting Hawaii and the Philippine Islands, the right of the United States to acquire Territories and to govern them as colonies was firmly established.

America had thus, in the truest sense of the term, become a world power. Its interests were both in the Orient and the Occident. It occupied in the Philippines a sphere of influence at the very gates of China. As with England, upon its vast domain the sun never sets.

It then became obvious that uniformity of legislation, which was quite practicable in continental America and with a reasonably homeogeneous population, had become impracticable when the Congress of the United States was obliged to deal not merely with its own people of continental America, but with millions of inhabitants of varying degrees of intelligence and civilization in the far-off Philippines.

A uniform rule with respect to ports of continental United States might prove wholly undesirable and even unworkable as applied to the ports of entry of the Philippine Islands. With respect to them, a special system of legislation had to be enacted to adjust the economic well-being of the Philippines to the conditions in the Orient, which environed these islands.

Chief Justice Marshall said in a passage already quoted, that the Constitution was intended "to endure for ages, and consequently to be adapted to the various crises of human affairs." Who shall say, in this period of overshadowing power, what the future territory or domain of the United States may be? The World War showed that it was impracticable for the United States to disentangle itself from the tangled skein of European and oriental politics and policies. Who can say what it may be required to do in the future ages in playing its part in the disordered affairs of mankind, as a master state of the world? Under these circumstances, would it not be most inadvisable to hold that the Constitution requires that the United States, in whatever exercise of world power it may hereafter assume, shall deal with all ports of entry which are subject to its jurisdiction with absolute equality?

If the Fathers had anticipated the control of the United States over the far-distant Philippine Islands, would they, whose concern was the reserved rights of the States, have considered for a moment a project that any special privilege which the interests of the

United States might require for the ports of entry of the several States should, by compulsion, be extended to ports of entry of colonial dependencies, living in a different civilization and having economic interests which might be wrecked by the application of the rule of equality?

In other words, provisions with respect to such ports as Boston, New York, Philadelphia, Baltimore, New Orleans, and San Francisco might well prove an intolerable burden to the port of Manila, or a regulation that would give special privileges to the port of Manila, in order to build up the economic prosperity of the Philippine Islands, might, if uniformity were required, cause lasting injury to the ports of the American continent.

In this connection, it was well said by Mr. Justice Brown, speaking for this court, in the case of *Holden* v. *Hardy*, 169 U. S. 366:

> In the future growth of the Nation, as heretofore, it is not impossible that Congress may see fit to annex Territories whose jurisprudence is that of the civil law. One of the considerations moving to such annexation might be the very fact that the territory so annexed should enter the Union with its traditions, laws, and systems of the administration unchanged. It would be a narrow construction of the Constitution to require to abandon these, or to substitute for a system, which represented the growth of generations of inhabitants, a jurisprudence

with which they had no previous acquaintance or sympathy."

The more one studies the Constitution of the United States, the more he is impressed with the surpassing and, at times, remarkably prophetic wisdom of its framers. When, in providing that the ports of one State should be given no preference over the ports of another State they were careful to leave to Congress plenary authority over the Territory, as such, they wisely gave an elasticity to the government which they were creating which enables this Government to realize its destiny as a world power.

JAMES M. BECK,
Solicitor General.

DECEMBER, 1921.

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See addendum, next page.

ADDENDUM.

The interesting question suggested in appellants' brief (pp. 22, *et seq.*) and briefly referred to in my brief (pp. 20, *et seq.*) as to the reason which impelled the framers of the Constitution to separate the clause now under consideration, with respect to preferential treatment of ports, from that which refers to uniformity of taxation, and the further question why, in the former clause, the words "of revenue" were added, when the latter provision, by its requirement of uniformity of taxes throughout the United States, effectually prevented the imposition by the Federal Government of different duties at different ports, are explained when due consideration is given to the fundamental distinction, which the men who framed the Constitution always had in mind, between a tax that was levied as a mere regulation of commerce and not for revenue and a pure revenue tax. To-day, that distinction has been almost wholly lost sight of in discussing the constitutional questions which underlay the American Revolution; and yet no distinction was more clearly recognized by the men of that era or more tenaciously adhered to.

In the constitutional struggle between the Colonies and the Crown the leaders of the colonial party did not question the constitutionality of a regulation of trade which diverted commerce from one port of the British Empire to another. Such pref-

erences were worked out, not merely by absolute prohibitions of importation, and exportation, but also by prohibitive duties; and, as long as the purpose was not to raise revenue, but merely to regulate foreign commerce of the British Empire, the constitutionality of such measures was not questioned.

The phrase "taxation without representation" had reference to taxes, which were levied upon the colonists for the purpose of revenue. Chief Justice Marshall, in the great case of *Gibbons* v. *Ogden* (9 Wheat. 1, 12), referred to this distinction in the following language:

> It is true that duties may often be, and in fact often are, imposed on tonnage, with a view to the regulation of commerce; but they may be also imposed with a view to revenue; and it was, therefore, a prudent caution to prohibit the States from exercising this power. The idea that the same measure might, according to circumstances, be arranged with different classes of power was no novelty to the framers of our Constitution. Those illustrious statesmen and patriots had been, many of them, deeply engaged in the discussions which preceded the War of our Revolution, and all of them were well read in those discussions. The right to regulate commerce, even by the imposition of duties, was not controverted; but the right to impose a duty for the purpose of revenue produced a war as important, perhaps, in its consequences

to the human race, as any the world has ever witnessed.

The remarks of the Chief Justice are fully borne out by history; and the classification of import duties into revenue duties and regulations of commerce lay at the basis of the American doctrine which led to the Revolutionary War. We may refer to the journals of the Continental Congress, volume 1, pages 28, 175, 176; volume 2, page 189; the examination of Dr. Benjamin Franklin at the bar of the House of Commons on February 7, 1776 (1 Bigelow's Life of Franklin, pp. 478, 479); John Dickinson's Letters from a Farmer, published in 1768, pages 15, 18–19, 37–42, 43 (note), 60, 61, 66; Dr. Franklin's letter to Joseph Galloway of February 25, 1775 (8 Spark's Franklin's Works, p. 147); John Adams's letter to Jay of July 19, 1785 (Works of John Adams, vol. 8, pp. 282, 283). The same view was maintained by the leading jurists and statesmen of the first two generations after the adoption of the Constitution; and with practical unanimity they based the protective tariff duties on the commerce clause of the Constitution. (1 Story on the Constitution, sec. 963; 2 *id.*, 1080, *et seq.*; James Madison's letter to Joseph C. Cabell of March 22, 1827 (Writings of James Madison, (Lippincott ed.), vol. 3, p. 571); his letter to Cabell of September 18, 1828 (*id.*, p. 636); Henry Clay's reply to Barbour, March 31, 1824 (Annals of Congress, p. 1994); Gulian C. Verplanck's Letter to Drayton, New York, 1831, pp. 21–23; Speech of

Thomas Smith Grimké, etc., Charleston, 1829, page 51). Mr. Grimké states that (p. 62):

> In 1790 Edmund Randolph, in his opinion to the President, states among the heads of the power to regulate commerce with foreign nations the power to prohibit their commodities, to impose or increase the duties on them.

Having in mind this distinction, let me now refer to the proceedings of the Convention of 1787 with reference to the clause in controversy.

The great grant had already been agreed upon under which the power to regulate foreign and interstate commerce was vested in the central government. Having granted it with little dissent, some of the members of the convention became concerned as to the possibilities to their States which were necessarily involved in such unlimited grant of power. As previously noted, they were quite familiar with the fact that the Lords of Trade, the bureau of the crown which governed the Colonies, had employed regulations of commerce to the great detriment of the Colonies and to the great advantage of other colonies of the Crown, and especially of the home industries of England.

Maryland was particularly concerned, as it occurred to its representatives that the grant of power to regulate commerce would make it easy for the Federal Government to require vessels bound to Baltimore to pay tribute to Virginia.

Accordingly, we find, on August 25, the following proceedings, which was the first suggestion to the Convention of the clause in controversy:

> Mr. Carroll and Mr. L. Martin expressed their apprehensions, and the probable apprehensions of their constituents, that under the power of regulating trade the General Legislature might favor the ports of particular States, by requiring vessels destined to or from other States to enter and clear thereat; as vessels belonging or bound to Baltimore, to enter and clear at Norfolk, &c. They moved the following proposition:
>
> "The Legislature of the United States shall not oblige vessels belonging to citizens thereof, or to foreigners, to enter or pay duties or imposts in any other State than in that to which they may be bound, or to clear out in any other than the State in which their cargoes may be laden on board; nor shall any privilege or immunity be granted to any vessel on entering or clearing out, or paying duties or imposts in one State in preference to another."
>
> Mr. Gorham thought such a precaution unnecessary, and that the revenue might be defeated, if vessels could run up long rivers, through the jurisdiction of different States, without being required to enter, with the opportunity of landing and selling their cargoes by the way.
>
> Mr. McHenry and Gen. Pinckney made the following propositions:
>
> "Should it be judged expedient by the Legislature of the United States, that one or

more ports for collecting duties or imposts, other than those ports of entrance and clearance already established by the respective States, should be established, the Legislature of the United States shall signify the same to the executives of the respective States, ascertaining the number of such ports judged necessary, to be laid by the said executives before the legislatures of the States at their next session; and the Legislature of the United States shall not have the power of fixing or establishing the particular ports for collecting duties or imposts in any State, except the legislature of such State shall neglect to fix and establish the same during their first session to be held after such notification by the Legislature of the United States to the executive of such State.

"All duties, imposts and excise, prohibitions or restraints, laid or made by the Legislature of the United States, shall be uniform and equal throughout the United States."

These several propositions were referred, *nem. con.*, to a committee composed of a member from each State. The committee appointed by ballot, were, Mr. Langdon, Mr. Gorham, Mr. Sherman, Mr. Dayton, Mr. Fitzsimons, Mr. Read, Mr. Carroll, Mr. Mason, Mr. Williamson, Mr. Butler, Mr. Few.

On August 28, the committee to whom the matter was referred made the following report, as shown in Madison's Journal:

In convention.—Mr. Sherman, from the committee to whom were referred several

propositions on the twenty-fifth instant, made the following report; which was ordered to lie on the table:

"That there be inserted, after the fourth clause of the 7th section: 'Nor shall any regulation of commerce or revenue give preference to the ports of one State over those of another, or oblige vessels bound to or from any State to enter, clear or pay duties in another; and all tonnage, duties, imposts, and excises laid by the legislature, shall be uniform throughout the United States.'"

On the 31st the report of the committee was taken up and the following proceedings took place:

The report of the grand committee of eleven, made by Mr. Sherman, was then taken up (see twenty-eighth of August).

On the question to agree to the following clause, to be inserted after article 7, sec. 4, "nor shall any regulation of commerce or revenue give preference to the ports of one State over those of another"—agreed to, *nem. con.*

On the clause, "or oblige vessels bound to or from any State to enter, clear, or pay duties, in another"—

Mr. Madison thought the restriction would be inconvenient; as in the River Delaware, if a vessel can not be required to make entry below the jurisdiction of Pennsylvania.

Mr. Fitzsimons admitted that it might be inconvenient, but thought it would be a greater inconvenience to require vessels bound to Philadelphia to enter below the jurisdiction of the State.

Mr. Gorham and Mr. Langdon contended that the Government would be so fettered by this clause as to defeat the good purpose of the plan. They mentioned the situation of the trade of Massachusetts and New Hampshire, the case of Sandy Hook, which is in the State of New Jersey, but where precautions against smuggling into New York ought to be established by the General Government.

Mr. McHenry said the clause would not screen a vessel from being obliged to take an officer on board as a security for due entry, &c.

Mr. Carroll was anxious that the clause should be agreed to. He assured the house that this was a tender point in Maryland.

Mr. Jenifer urged the necessity of the clause in the same point of view.

On the question for agreeing to it—

Connecticut, New Jersey, Pennsylvania, Delaware, Maryland, Virginia, North Carolina, Georgia, aye—8; New Hampshire, South Carolina, no—2.

The word "tonnage" was struck out, *nem. con.*, as comprehended in "duties."

On the question on the clause of the report, "and all duties, imposts and excises, laid by the legislature, shall be uniform throughout the United States," it was agreed to, *nem. con.*

On September 12, the Committee on Arrangement and Style, to whom all the tentatively adopted clauses had been referred, made its report, and it is a curious fact that, for some reason, the whole clause, including the provisions as to preferences to ports, as well as to uniformity of taxation, was omitted

from the draft. I find nothing in Madison's Journal to explain this omission.

On September 14—three days before the close of the convention—the following took place:

> On motion of Col. Mason, the words "or enumeration" were inserted after, as explanatory of "census,"—Connecticut and South Carolina, only, no.
>
> At the end of the clause, "no tax or duty shall be laid on articles exported from any State," was added the following amendment, conformably to a vote on the 31st of August, (p. 647,) viz, "no preference shall be given, by any regulation of commerce or revenue, to the ports of one State over those of another; nor shall vessels bound to or from one State be obliged to enter, clear, or pay duties, in another."

It will thus be seen that the clause in controversy in the instant case was, for some reason, removed from the clause which required uniformity of taxation and attached to the clause which forbade any State to impose an export duty.

These are the only references that I find in Mr. Madison's Journal.

Having in mind the distinction already referred to, which the framers of the Constitution had in mind, between a regulation of commerce, whether accomplished by an affirmative prohibition or the indirect effect of a prohibitory tax, it seems clear to me that they separated the two clauses because of this distinction. When they were referring to taxes to

be levied by the United States for the benefit of the treasury, they required uniformity "throughout the United States;" but when they were considering the possibility of discriminatory legislation, whether by taxes or otherwise, in favor of one port and against another, they wrote a different clause, and, instead of using the words "throughout the United States," they expressly provided that Congress should not impose any tax or duty upon "articles exported from any State," adding that—

> No preference shall be given by any regulations of commerce or revenue to the ports of one State over those of another, nor shall vessels bound to or from one State be obliged to enter, clear, or pay duties in another.

It is clear, therefore, that the great purpose that they had in mind was that the Federal Government, in exercising its power to regulate foreign commerce, should not build up the port of one State, to the prejudice of another. It was, as previously suggested in this brief, the privilege of the States, as political entities, and not that of the citizens thereof.

In any one State, the Government could, in establishing its ports of entry, prefer one port to another port; but it was forbidden to discriminate between States, as such; and, as previously argued, it is inconceivable that the framers of the Constitution had in mind the ports of the territories, when no such ports existed or were even in contemplation, and when, over the territories, plenary power had been conferred upon the Federal Government.

IN THE

SUPREME COURT OF THE UNITED STATES

No. 392.

THE TERRITORY OF ALASKA AND JUNEAU HARDWARE COMPANY, A CORPORATION, APPELLANTS,

vs.

JOHN TROY, COLLECTOR OF CUSTOMS, APPELLEE.

ADDENDUM TO APPELLANTS' BRIEF.

By what authority can Congress legislate for Alaska?

Only by virtue of the authority granted in the treaty with Russia ceding the territory to the United States.

But the authority granted by that document is not unlimited, but expressly limited. The legislation here in question is in excess of that authority.

The question now submitted is whether legislation which transcends the limitations upon the authority of Congress is valid. Is it not *ultra vires* and as such void?

In the Insular cases this Court held that, in legislating for a territory acquired from a foreign nation, the extent of the power of Congress was determined by the treaty of cession. If this doctrine be applied to Alaska, the treaty of 1867 must determine the extent of the authority of Congress over that territory.

Respectfully submitted,

JOHN RUSTGARD,
Attorney for Appellants.

TERRITORY OF ALASKA ET AL. *v.* TROY, COLLECTOR OF CUSTOMS FOR THE DISTRICT OF ALASKA.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF ALASKA, DIVISION NO. 1.

No. 392. Argued December 14, 15, 1921.—Decided February 27, 1922.

1. Alaska has been incorporated into and is part of the United States; and the Constitution, so far as applicable, is controlling upon Congress when legislating in respect thereto. P. 110.
2. Section 27 of the Merchant Marine Act, forbidding, with exceptions, transportation of merchandise over routes between points within the United States in vessels not built in the United States or documented under its laws and owned by its citizens, is a regulation of commerce and not within § 8 of Art. I of the Constitution requiring uniformity throughout the United States of duties, imposts and excises. P. 110.
3. Alaska is not a State, within § 9 of Art. I of the Constitution, declaring "No preference shall be given by any regulation of commerce or revenue to the ports of one State over those of another." P. 111. *Downes* v. *Bidwell*, 182 U. S. 244, considered.

Affirmed.

APPEAL from a decree of the District Court of the United States for the District of Alaska sustaining a demurrer to, and dismissing, the amended complaint, in a suit brought by the Territory and the Juneau Hardware Company to restrain the local Collector of Customs from confiscating merchandise, shipped or to be shipped by the Hardware Company or others in Alaska, from points in the United States over Canadian Railroads to Canadian ports, and thence to Alaska by British vessels not authorized under § 27 of the Merchant Marine Act, or merchandise to be shipped in like manner from Alaska to the United States.

Mr. John Rustgard, Attorney General of the Territory of Alaska, for appellants.

Equal rights to trade and commerce and the equal right of access to the ports and markets of the various States are among property rights of citizens of the United States guaranteed to the people of Alaska by the treaty of cession. They are "privileges and immunities." Arts. of Confederation IV; Const., Art IV, § 2; *Slaughter-House Cases,* 16 Wall. 36; *Crandall* v. *Nevada,* 6 Wall. 35; *Lochner* v. *United States,* 198 U. S. 45.

When the people of the Territory of Alaska were admitted to the rights, privileges and immunities of American citizens, and when it was guaranteed to them that they should be maintained and protected in the free enjoyment of their property, it comprehended, not only the equal right to life and liberty, but the equal right to trade and commerce, the equal right of ingress and egress to and from the several States,—these being indispensable property rights. Nothing less is meant by the right to equal protection of the laws.

Independently of the treaty, Congress has expressly extended the Constitution to Alaska, first by § 1891, Rev. Stats., and later by § 3 of the Act of August 24, 1912, and this court has declared in several decisions that Alaska has been incorporated into the United States and forms an integral part thereof.

For this reason cl. 6, § 9, Art. I, of the Constitution protects the ports of Alaska to the same extent that it protects the ports of a State. *Loughborough* v. *Blake,* 5 Wheat. 317; *Rassmussen* v. *United States,* 197 U. S. 516; *Binns* v. *United States,* 194 U. S. 486.

It is conceded that the prohibition of this clause against discrimination by regulation of revenue applies to and protects an incorporated Territory. This protection would be futile unless it was accompanied by an inhibition against discrimination by regulation of commerce, and for

that reason the two are joined in the same clause. The history of the adoption of this clause of the Constitution demonstrates that, like the clause requiring uniformity of duties, it was intended to apply to the entire "American Empire." *Knowlton* v. *Moore*, 178 U. S. 107.

In the Insular Cases this court held that the clause in question would have operated to protect Porto Rico had that Territory been incorporated into the United States, the same as is Alaska, or had Congress expressly extended the Constitution to that island. *Downes* v. *Bidwell*, 182 U. S. 244, 249, 288, 292, 352, 354.

The word "State" as employed in the Constitution is frequently interpreted by this court to include a Territory. For instance, in the cl. 3 of § 8 where authority is given "to regulate commerce with foreign nations and among the several States, and with the Indian tribes," this court has held it applies to commerce between a State and a Territory. Similar results have been obtained from construction of cl. 5, § 9, Art. I; cl. 1 and 2, § 10; cl. 1, § 2, Art. IV, and the Fourteenth Amendment. In dealing with an incorporated Territory, Congress may act as a federal legislature or as a local legislature. Acting as a federal legislature it is bound by the general limitations of the Constitution. Acting as a local legislature it has such powers as are possessed by a state legislature, but no more.

The law here in question was enacted by Congress in its federal capacity and under the commerce clause. Laws enacted under that power must be uniform and deal equally with all.

Whether acting as a federal or a territorial legislature, Congress has no power to deny the people of any Territory to which the Constitution has been extended the same rights of commerce accorded to the people of other parts of the country. See *Passenger Cases*, 7 How. 492; *Downes* v. *Bidwell*, 182 U. S. 360; *Dred Scott* v. *Sandford*, 19 How. 393; *United States v. Morris*, Fed. Cas. No.

15,815; *Murphy* v. *Ramsey*, 114 U. S. 15; *Dooley* v. *United States*, 183 U. S. 151, 168, 171, 172, 173; *Pope* v. *Williams*, 193 U. S. 632; *United States* v. *Anthony*, Fed. Cas. No. 14,459; *Stone* v. *Smith*, 159 Mass. 414; *Stoutenburgh* v. *Hennick*, 129 U. S. 141.

Clause 2 of § 3, Art. IV, was not intended to in any manner deny to the people of a Territory the rights of American citizens, but was intended to give Congress power to deal with internal affairs of the embryo States until they were able to assume the duties of their own sovereignty. This section of the Constitution must be read in conjunction with the Ordinance of 1787 which remained in full force and effect after the Constitution was adopted, and has been construed as applicable to all the Territories incorporated into the Union after the adoption of the Constitution. Meigs, The Growth of the Constitution in the Federal Convention of 1787; *Spooner* v. *McConnell*, Fed. Cas. No. 13,245; *Cincinnati* v. *Louisville & Nashville R. R. Co.*, 223 U. S. 390; *Choisser* v. *Hargraves*, 2 Ill. 317; *Palmer* v. *Cuyahoga County*, Fed. Cas. No. 10,688.

It is not necessary to allege in the complaint that the rate tariffs had been filed with the Interstate Commerce Commission or that the latter has established through rates.

The entire § 27 of the Act of 1920 is void because it discriminates in favor of that part of the United States which is on the continent and situated between Canada and Mexico. The executive departments can not render it valid by extending the law to the Territories which it expressly excludes. Nor can the courts render the law constitutional by giving it an interpretation which Congress expressly provides that it should not have.

Mr. Solicitor General Beck for appellee.

An examination of each reference in the Constitution to the States shows that with but few exceptions the word

"State" was intended to be construed literally. It must be admitted that in the commerce clause "among the several States" imported a sphere of power that was in part beyond the State, and the words "with the Indian tribes," most of which then lived in the Territories, clearly show that power was given to the Congress to regulate all commerce, except that which was wholly within a State. Hence, commerce with the Territories is expressly included in this grant of power. And it must also be admitted that in the matter of the fundamental personal rights of the individual, his rights were safeguarded by the pertinent provisions of the Constitution and the amendments, no matter where he might be under our flag.

But, in general, it is clear that the term "State," or "the several States," has a precise and definite signification, and that the word "Territory" has a similar precise meaning.

There is also a clear and distinct difference between the meaning of the word "State" in the original Constitution, which concerned itself almost wholly with the distribution of powers between the Federal Government and the States, and the amendments to the Constitution, the first ten of which were intended as a Bill of Rights to guarantee the liberty of the individual.

If in the clause of the Constitution which provides that no preference shall be given "to the ports of one State over those of another" it had been intended to refer to the Territories, would not the clause have read "no preference shall be given by any regulation of commerce or revenue to any port in the United States"?

It is quite obvious that the economic question as to how Congress shall regulate foreign and interstate commerce by regulating ports of entry is not, in any true sense, a question of personal right. It is an economic and political question, which concerns States and not individuals. "What is forbidden, is not discrimination

between individual ports within the same or different States, but discrimination between States." *Pennsylvania* v. *Wheeling & Belmont Bridge Co.*, 18 How. 421, 435.

The remainder of the clause—" Nor shall vessels bound to, or from, one State, be obliged to enter, clear, or pay duties in another "—shows also that this clause of the Constitution was placed there for the protection of the States. The immunity from discrimination is a reserved right on the part of the constituent States and does not pertain to individual ports, much less to individual persons.

Outside of the States and in the Territories and colonial dependencies of the United States, the question of uniform treatment of ports of entry is one of governmental policy. It is well known that the purpose of this provision was to allay the alarm of the various States, if the plenary power over foreign commerce was granted to the Federal Government.

There was an obvious reason why they did not extend this assurance of equal terms to the ports of a Territory. They did not have in mind ports of a Territory, for none such existed. The " Territory " contained no " port " in the sense of the word in which the framers used the term. This becomes the more obvious if it be recalled that the original conception of the commerce clause related only to commerce by vessels, whether trans-Atlantic or coastwise. It is quite clear that internal land transportation was not at first regarded as a part of the commercial power of the Union. *Perrin* v. *Sikes*, 1 Day (Conn.) 19; 2 McMaster, History of the American People, p. 60. Cf. *Conway* v. *Taylor's Executor*, 1 Black, 603.

Moreover, the clear distinction of governmental power between States and Territories must constantly be borne in mind. As to the States, there was only a limited delegation of power, subject to many reservations and quali-

fications. As to the Territory, there was a plenary power to deal with it as the property of the United States, to the extent even of disposing of it at the pleasure of the Federal Government.

The reason which impelled the framers of the Constitution to separate the clause now under consideration, with respect to preferential treatment of ports, from that which refers to uniformity of taxation, and the addition of the words " of revenue " in the former clause, when the latter provision, by its requirement of uniformity of taxes throughout the United States, effectually prevented the imposition by the Federal Government of different duties at different ports, are explained when due consideration is given to the fundamental distinction, which the framers of the Constitution always had in mind, between a tax that was levied as a mere regulation of commerce and not for revenue and a pure revenue tax. Today, that distinction has been almost wholly lost sight of in discussing the constitutional questions which underlay the American Revolution; and yet no distinction was more clearly recognized by the men of that era or more tenaciously adhered to.

The phrase " taxation without representation " had reference to taxes, which were levied upon the colonists for the purpose of revenue. Chief Justice Marshall referred to this distinction in *Gibbons* v. *Ogden,* 9 Wheat. 1, 12. His remarks are fully borne out by history; and the classification of import duties into revenue duties and regulations of commerce lay at the basis of the American doctrine which led to the Revolutionary War. We may refer to the journals of the Continental Congress, vol. I, pp. 28, 175, 176; vol. II, p. 189; the examination of Dr. Benjamin Franklin at the bar of the House of Commons on February 7, 1776, 1 Bigelow's Life of Franklin, pp. 478, 479; John Dickinson's Letters from a Farmer, published in 1768, pp. 15, 18–19, 37–42, 43, note, 60, 61, 66; Dr. Franklin's letter to

Joseph Galloway of February 25, 1775, 8 Spark's Franklin's Works, p. 147; John Adams' letter to Jay of July 19, 1785, Works of John Adams, vol. 8, pp. 282, 283. The same view was maintained by the leading jurists and statesmen of the first two generations after the adoption of the Constitution; and with practical unanimity they based the protective tariff duties on the commerce clause of the Constitution. 1 Story on the Constitution, § 963; 2 *id.*, 1080, *et seq.;* James Madison's letter to Joseph C. Cabell of March 22, 1827, Writings of James Madison, Lippincott ed., vol. 3, p. 571; his letter to Cabell of September 18, 1828, *id.*, p. 636; Henry Clay's reply to Barbour, March 31, 1824, Annals of Congress, p. 1994; Gulian C. Verplanck's Letter to Drayton, New York, 1831, pp. 21–23; Speech of Thomas Smith Grimké, etc., Charleston, 1829, p. 51.

In the proceedings of the Constitutional Convention, the clause in controversy was removed from the clause which required uniformity of taxation and attached to the clause which forbade any State to impose an export duty. It seems clear that they separated the two clauses because of the distinction referred to. Would it not be most inadvisable to hold that the Constitution requires that the United States, in whatever exercise of world power it may hereafter assume, shall deal with all ports of entry which are subject to its jurisdiction with absolute equality?

If the Fathers had anticipated the control of the United States over the far-distant Philippine Islands, would they, whose concern was the reserved rights of the States, have considered for a moment a project that any special privilege which the interests of the United States might require for the ports of entry of the several States should, by compulsion, be extended to ports of entry of colonial dependencies, living in a different civilization and having economic interests which might be wrecked by the application of the rule of equality?

MR. JUSTICE MCREYNOLDS delivered the opinion of the court.

In the court below appellants' bill was dismissed upon demurrer. It attacks the validity of § 27, Merchant Marine Act of June 5, 1920, c. 250, 41 Stat. 988,[1] upon the ground that the regulation of commerce prescribed therein gives a preference to ports of the Pacific Coast States over those of Alaska, contrary to § 9, Art. I, Federal Constitution—"No preference shall be given by any regulation of commerce or revenue to the ports of one State over those of another."

The act purports among other things "to provide for the promotion and maintenance of the American merchant marine," and § 27 forbids transportation of mer-

[1] Act of June 5, 1920.—To provide for the promotion and maintenance of the American merchant marine, to repeal certain emergency legislation, and provide for the disposition, regulation, and use of property acquired thereunder, and for other purposes.

Sec. 27. That no merchandise shall be transported by water, or by land and water, on penalty of forfeiture thereof, between points in the United States, including Districts, Territories, and possessions thereof embraced within the coastwise laws, either directly or via a foreign port, or for any part of the transportation, in any other vessel than a vessel built in and documented under the laws of the United States and owned by persons who are citizens of the United States, or vessels to which the privilege of engaging in the coastwise trade is extended by sections 18 or 22 of this Act: *Provided*, That this section shall not apply to merchandise transported between points within the continental United States, excluding Alaska, over through routes heretofore or hereafter recognized by the Interstate Commerce Commission for which routes rate tariffs have been or shall hereafter be filed with said commission when such routes are in part over Canadian rail lines and their own or other connecting water facilities: *Provided further*, That this section shall not become effective upon the Yukon river until the Alaska Railroad shall be completed and the Shipping Board shall find that proper facilities will be furnished for transportation by persons citizens of the United States for properly handling the traffic.

chandise over any portion of the route between points in the United States *including* Alaska "in any other vessel than a vessel built in and documented under the laws of the United States and owned by persons who are citizens of the United States, or vessels to which the privilege of engaging in the coastwise trade is extended by sections 18 or 22 of this Act," *provided* that under certain conditions this limitation shall not apply to merchandise transported between points within the United States, *excluding* Alaska, over through routes by Canadian rail lines and connecting water facilities.

The bill assumes that the preference is obvious upon a consideration of the statute without more. And although by fostering lines of boats which afford frequent, regular and speedy service, and otherwise, the practical effect may be highly beneficial to Alaskan ports, nevertheless, in view of the record, we will assume that the act does give preference to ports of the States over those of the Territory.

Alaska has been incorporated into and is part of the United States, and the Constitution, so far as applicable, is controlling upon Congress when legislating in respect thereto. *Rassmussen* v. *United States*, 197 U. S. 516, 525, 528. It has been organized and is governed under appropriate congressional action. For present purposes, therefore, we need not inquire into the object and scope of the treaty of cession.

The questioned regulation relates directly to commerce and clearly is not within the usual meaning of the words of § 8, Art. I, of the Constitution—"All duties, imposts and excises shall be uniform throughout the United States." That such regulations are not controlled by the uniformity clause was pointed out in *Cooley* v. *Board of Wardens of Port of Philadelphia*, 12 How. 299, 314:

"But, having previously stated that, in this instance, the law complained of does not pass the appropriate line

which limits laws for the regulation of pilots and pilotage, the suggestion, that this law levies a duty on tonnage or on imports or exports, is not admissible; and, if so, it also follows, that this law is not repugnant to the first clause of the eighth section of the first article of the Constitution, which declares that all duties, imposts, and excises shall be uniform throughout the United States; for, if it is not to be deemed a law levying a duty, impost, or excise, the want of uniformity throughout the United States is not objectionable."

The appellants insist that "State" in the preference clause includes an incorporated and organized territory. This word appears very often in the Constitution and as generally used therein it clearly excludes a "Territory." To justify the broad meaning now suggested would require considerations more cogent than any which have been suggested. Obviously, the best interests of a detached territory may often demand that its ports be treated very differently from those within the States. And we can find nothing in the Constitution itself or its history which compels the conclusion that it was intended to deprive Congress of power so to act. See *Pennsylvania* v. *Wheeling & Belmont Bridge Co.*, 18 How. 421; *Knowlton* v. *Moore*, 178 U. S. 41, 107.

Great weight is attributed to certain statements concerning the preference clause found in the several opinions announced in *Downes* v. *Bidwell*, 182 U. S. 244, 249, 288, 352, 354, 355. But none of these opinions was accepted by a majority of the court and statements therein are not binding upon us. That controversy grew out of a revenue measure and the point now presented was not directly involved. The writers used the language relied upon in arguments intended to support their particular views concerning the fundamental points. Without attempting to ascertain the exact purport of these expressions it suffices to say that they afford no adequate support for appellants' position.

A quotation from the opinion of the court in *Rassmussen* v. *United States*, 197 U. S. 516, 520, is apposite:

"In *Dorr* v. *United States*, 195 U. S. 138, the question was whether the Sixth Amendment was controlling upon Congress in legislating for the Philippine Islands. Applying the principles which caused a majority of the judges who concurred in *Downes* v. *Bidwell*, 182 U. S. 244, to think that the uniformity clause of the Constitution was inapplicable to Porto Rico, and following the ruling announced in *Hawaii* v. *Mankichi*, 190 U. S. 197, it was decided that, whilst by the treaty with Spain the Philippine Islands had come under the sovereignty of the United States and were subject to its control as a dependency or possession, those Islands had not been incorporated into the United States as a part thereof, and therefore Congress, in legislating concerning them, was subject only to the provisions of the Constitution applicable to territory occupying that relation."

The judgment below is

Affirmed.